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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 740

THE STATE OF OHIO, *ex rel.* THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Relator-Appellant,

vs.

CITY OF EUCLID, OHIO,
and
M. A. SPINO,
Administrative Director of the City of Euclid,
and
KENNETH J. SIMS,
Mayor of the City of Euclid,

Respondents-Appellees.

JURISDICTIONAL STATEMENT.

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M. A. SPINO,

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and

KENNETH J. SIMS,

Mayor of the City of Euclid,

Respondents-Appellees.

JURISDICTIONAL STATEMENT.

PRELIMINARY STATEMENT.

This is an appeal from a judgment of the Supreme Court of Ohio, announced on July 15, 1959, and adhered to after rehearing by an opinion issued on November 4, 1959, reversing a judgment of the Court of Appeals for Cuyahoga County, Ohio, in an action in mandamus originating in the Court of Appeals. The Relator-Appellant, The Cleveland Electric Illuminating Company sought and obtained from the Court of Appeals a writ of mandamus requiring the Respondents-Appellees, the City of Euclid, Ohio, and two of its officials, to issue to the Relator-Appellant a permit to cross six streets in said City with the

conductors of an overhead electric transmission line carrying energy at 132,000 volts (132 KV) to be constructed on private right-of-way through an industrial area adjacent to a railroad. The writ was sought (and granted in the Court of Appeals) on the ground that an ordinance prohibiting the issuance of the permit took Re[illegible]pellant's property without due process of law a[illegible]red its franchise contract.

This Statement is submitted by Relator-Appellant to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented, both as to substantive and procedural due process, which affect all classes of litigants, not alone corporate utilities.

OPINIONS BELOW.

The first opinion of the Supreme Court of Ohio and the dissenting opinion are officially reported at 169 Ohio St. 476, and at 159 N. E. 2d 756. The per curiam decision of the Supreme Court of Ohio to adhere to its former judgment after rehearing is officially reported at 170 Ohio St. 45, and at 162 N. E. 2d 125. In the Court of Appeals for Cuyahoga County, Ohio, the matter was referred to a Special Master Commissioner. The Master filed a Report of his findings of fact and of law which was not officially reported. The Report of the Master was adopted as its own findings of fact and conclusions of law by the Court of Appeals after a hearing on Relator-Appellant's motion to confirm and Respondents-Appellees' exceptions, and a writ of mandamus was ordered issued as prayed for. The order of the Court of Appeals has not been officially reported. Copies of the original opinion of the Supreme Court of Ohio, the opinion of the three dissenting judges of such Court and its per curiam opinion adhering to its former

judgment after rehearing, the order of the Court of Appeals for Cuyahoga County, Ohio, and the Report of the Special Master Commissioner, Professor Clinton DeWitt of Western Reserve Law School, are attached hereto as Appendix A to this Statement.

JURISDICTION.

The Village (now city) of Euclid, the Respondent-Appellee, by Ordinance No. 32, duly enacted in 1906, granted Relator-Appellant a franchise, without limitation as to time, to place its poles, wires and conduits and other fixtures for the transmission of electric energy by overhead or underground lines in the streets of the Village. Such ordinance was duly accepted by the Relator-Appellant according to its terms. Under Ohio law then (and now) in effect electric companies received their franchise to do business in municipalities by state statute but required the consent of the municipality to occupy its streets for such purpose. Ordinance No. 32 was such consent.

In 1956 the City passed Ordinance No. 288-1956, which prohibits the issuance of a permit for the crossing of city streets by any electric line which will serve, wholly or in part, persons not residents of Euclid. This ordinance was amended in 1957 by Ordinance No. 78-1957, which requires that all electric transmission lines carrying energy in excess of 33,000 volts be placed underground.

Thereafter Relator-Appellant applied under its franchise contract for a permit to cross six streets with the conductors of a transmission line to carry energy at 132,000 volts and to serve in substantial part consumers outside the city, to be built through the city on private right-of-way adjacent to a railroad. The permit was refused, whereupon this suit to require the permit to be issued was filed.

The Relator-Appellant claimed in its petition that Ordinance No. 288-1956 as amended by Ordinance No. 78-1957 is unreasonable and arbitrary in its prohibition of the line in question and is, in its application, an impairment of the franchise ordinance of 1906, and a deprivation of the property of Relator-Appellant without the due process of law required by the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals found as a fact from the evidence that the proposed line would involve no appreciable danger to the public health, safety or welfare and held (1) that the prohibition of overhead construction was on the facts contrary to due process and (2) that the prohibition of construction within the City of Euclid for service to non-resident consumers was an unconstitutional impairment of Relator-Appellant's franchise contract with the Respondent-Appellee city.

In an opinion announced July 15, 1959, the Supreme Court of Ohio, dividing 4 to 3, held, on the basis of "judicial notice," that contrary to the express finding of fact below, the proposed construction was dangerous, that the prohibition of overhead construction was consistent with due process so that the permit was properly refused on that ground. It was thus unnecessary for the Court to pass upon the question of impairment of contract and it did not do so. The ground of the Court's decision was not suggested by any party.

On application of Relator-Appellant, filed on July 28, 1959, a rehearing was held on October 6, 1959. The Supreme Court of Ohio, in a per curiam opinion announced on November 4, 1959, ruled that it would adhere to its former judgment of July 15, 1959. Relator-Appellant filed a notice of appeal with the Clerk of the Supreme Court of Ohio on January 19, 1960.

Title 28, United States Code, Section 1257(2) authorizes the United States Supreme Court to review the decision of the Supreme Court of Ohio in this case by appeal. That section provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity."

The following cases sustain the jurisdiction of the Supreme Court to review a decision of a state supreme court sustaining an ordinance claimed to be repugnant to the Constitution of the United States. *King Manufacturing Co. v. City Council of Augusta*, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413 (1943); *Breard v. City of Alexandria*, 341 U. S. 622, 625 (1951); *Poulos v. New Hampshire*, 345 U. S. 395, 402 (1953); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79 (1947).

STATUTES INVOLVED.

Ordinance No. 288-1956 of the City of Euclid, as amended by Ordinance No. 78-1957, which Relator-Appellant claims is repugnant to the Constitution of the United States provides:

> "Now, THEREFORE, be it ordained by the Council of the City of Euclid, State of Ohio:
>
> "*Section 1: Pole Lines.*
>
> "No person, firm or corporation shall erect or construct or cause to be erected or constructed any pole for any guy line, wires, or electrical conductors of any

description whatever upon or across any streets, avenues, alleys or public property within the City of Euclid without first having obtained a permit therefor.

"*Section 2: Permits.*

"In the case of a telephone company, such permit shall be issued by the Administrative Director. In the case of an electric company, the Administrative Director is hereby authorized to issue such permit, where the voltage to be carried is solely for the use by a residential, institutional or governmental consumer within the City of Euclid, or solely for the normal requirements of an industrial or retail business, or service consumer within the City of Euclid and provided that such voltage at no time shall exceed 33 KV. In the case of an electric company where the proposed voltage to be carried does exceed 33 KV, the permit shall be authorized by the Council. The form of the permit shall be as approved by the Director of Law and no fee shall be charged for such permit. Such permit shall specifically be subject to the terms and conditions of all ordinances of the City of Euclid pertaining to any franchise rights of the public utility and to the provisions and reservations of Article IX of the Charter of the City of Euclid. No permit shall be issued until the public utility shall first have filed appropriate plans in the office of the Administrative Director, which shall be permanently filed in his records.

"*Section 2.1: Permit Issued by Council.*

"It shall be unlawful to construct or maintain an electric power line carrying greater voltage than 33 KV, without first obtaining a permit therefor from the Council. No charge shall be made for such permit. The applicant shall first file plans and specifications, which shall show the course and route of such proposed line in or through the City of

Euclid. Such line shall be installed underground, at a minimum depth of six feet below grade. It shall be backfilled by and laid in at least six inches of sand. It shall be standard underground pipe-type cable, lead covered, to be no less than the standard minimum A.E.I.C. specification as to voltage, herein adopted. Such line shall be encased in an enclosed sealed and welded steel pipe with protective sheath, having a somatic coating. Such pipe may either be oil or gas filled and shall be capable of withstanding any maintained pressure.'"

Ordinance No. 32, which was duly accepted by the Relator-Appellant, is the franchise contract which Relator-Appellant claims is impaired by Ordinance No. 288-1956, as amended. Ordinance No. 32 is as follows:

"An Ordinance granting to The Cleveland Electric Illuminating Company and its successors, the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys and ways of the Village of Euclid, for the purpose of furnishing to said Village, the general public and private persons, light, heat and power by electric currents.

"Section 1. BE IT ORDAINED by the Village Council of the Village of Euclid, State of Ohio, that The Cleveland Electric Illuminating Company and its successors, be, and they are hereby, granted the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it to transmit electricity through and along the streets, alleys and ways of the Village of Euclid for the purpose of furnishing to said Village,

the general public and private persons, light, heat and power by electric currents.

"Section 2. All the wires used by The Cleveland Electric Illuminating Company shall be properly insulated, and shall comply with all state regulations and ordinances to be passed by this Village requiring proper insulation, and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said Village.

"Section 3. The Cleveland Electric Illuminating Company or its successors shall before any work is commenced, submit to the proper officers of the Village, plans, showing the work it proposes to do in the erection of poles, wires, appliances, or in the building of conduits, and receive a proper permit therefor each time before any new work shall be undertaken, and, they shall be kept upon file in the office of the Village Clerk, with a proper record, showing that a permit for their construction has been entered, and thereupon The Cleveland Electric Illuminating Company or its successors shall have the right to proceed with its or their work in accordance with the plans and specifications placed on file by it or them.

"Section 4. No pole or mast shall be erected by The Cleveland Electric Illuminating Company or its successors without the consent of the property owner before whose premises the said pole or mast is proposed to be placed; and the location of any pole, pier or support shall be subject to the control and direction of the Council of the Village of Euclid and shall be changed by The Cleveland Electric Illuminating Company or its successors to such other location as may be directed whenever in the opinion of the Council the best interest of the Village and the general public demand the removal of the same.

"Section 5. The Cleveland Electric Illuminating Company shall protect and indemnify the Village of Euclid, upon any and all claims for damages which may in any wise arise from the exercise of the rights and privileges herein granted.

"Section 6. The Cleveland Electric Illuminating Company shall within ten days from the passage of this ordinance, file with the Village Clerk a written acceptance of the conditions of this ordinance, and shall pay the cost of publication of this ordinance.

"Section 7. This ordinance shall take effect and be in force from and after its passage and legal publication and the filing of the foregoing acceptance and the payment of costs of publication by The Cleveland Electric Illuminating Company."

The consent to occupy the streets with overhead lines contained in Ordinance No. 32 was given pursuant to Ohio Revised Code § 4933.13, which is as follows:

"§ 4933.13. A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires."

The consent to occupy the streets with underground lines contained in Ordinance No. 32 was given pursuant to Ohio Revised Code, § 4931.20. That section refers to tele-

graph companies but under Ohio Revised Code § 4933.14 applies also to electric companies. Section 4931.20 is as follows:

> "§ 4931.20. Any company owning and operating a telephone exchange or doing a telegraph business, in any municipal corporation in this state, may construct and maintain underground wires, pipes, conduits, and other fixtures for containing, protecting, and operating such wires, in the streets and public ways of such municipal corporation, when the consent of such municipal corporation has been obtained. Any ordinance of any village purporting to grant the right or privilege to any telephone or telegraph company to construct and maintain underground wires and pipes, conduits, and other underground fixtures for containing, protecting, and operating such wires, in the streets and public ways of such village, when such grant has been accepted, or when money has been expended in good faith on account thereof, is valid and effective."

The foregoing sections have not been amended since the enactment of Ordinance No. 32 in 1906, except for non-substantive changes by revisors.

QUESTIONS PRESENTED.

The Relator-Appellant has a franchise from the State of Ohio to do business in the Respondent-Appellee, City of Euclid, and through northeastern Ohio, and the consent of said City to occupy its streets with its wires and poles, either overhead or underground, as may in the discretion of Relator-Appellant be reasonable and necessary to serve the public with electric service. Such consent was given in 1906 by a franchise contract containing no limit as to time. The Respondent-Appellant City passed an ordinance prohibiting the crossing above ground of any of its streets by an electric line carrying electricity at voltages greater than 33,000 and prohibiting the construction of an electric line of any kind unless it is solely for the "normal requirements" of consumers within said City. The City of Euclid is a suburb of Cleveland, Ohio, and is one of a large number of contiguous municipalities which make up the area of metropolitan Cleveland. On the basis of the ordinance referred to, the Relator-Appellant was denied a permit to cross six streets with the conductors of a proposed 132,000 volt overhead steel tower line constructed next to a railroad on private right-of-way.

After six weeks of trial the trial court, which was the trier of facts, expressly found that the proposed lines would not create any appreciable adverse effect on the public health, welfare or safety and that the application of the ordinance to prohibit the permit for the line had no reasonable relation to the ends for which the police power might be constitutionally exercised and would be an impairment of the rights of Relator-Appellant under its franchise ordinance and a deprivation of its property without due process of law, and further found, *inter alia*, that the 132,000 volt line would not create any appreciable hazard, that placing of the line underground would

cost the utility four and one-half times as much as placing it overhead (an excess cost of about $4,500,000) and that the application of the ordinance to prohibit the issuance of a permit for the 132,000 volt line was arbitrary and unreasonable and a deprivation of the property of the utility without due process of law and an impairment of the franchise ordinance.

The Supreme Court of Ohio reversed on the ground that the requirement of underground construction was a reasonable exercise of the police power. This conclusion was based upon "judicial notice" that the prohibited overhead construction would be dangerous, contrary to the express finding of fact, based upon evidence, of the court below.

The following questions are presented:

1. Was Relator-Appellant denied the procedural due process of law which is protected by the Fourteenth Amendment to the Constitution of the United States when the Supreme Court of the State reversed the decision of the lower court in a case where the question litigated was whether the ordinance is unreasonable and arbitrary and contrary to due process of law in its application to a particular factual situation, by taking judicial notice of the ultimate question of fact contrary to the contention of Relator-Appellant and contrary to the express findings of fact made by the trier of facts after hearing evidence and without reviewing the record to determine whether the findings of fact were supported by the evidence?
2. Was Relator-Appellant denied the due process of law which is protected by the Fourteenth Amendment of the Constitution of the United States, or was its franchise contract impaired by the State of Ohio, in violation of Article I, Section 10, of the Constitution of the

United States, when the Supreme Court of Ohio reversed the decision of the lower court in a case where the question litigated was whether the application of the ordinance to a paricular fact situation was unreasonable and arbitrary when such reversal was on the ground that the general subject matter of the ordinance was a proper subject for police regulation —which was not in issue but admitted by Relator-Appellant—and such Court failed and refused to consider whether the application of the ordinance to the facts before it was reasonable?

3. Is the application of the ordinance a deprivation of the property of Relator-Appellant without due process of law when the ordinance is applied to prohibit the issuance of a permit for the crossing of six streets in the City by the conductors for a 132,000 volt electric transmission line when the lower court found, as facts, that the transmission line would create no appreciable hazard to the public and the construction of the line underground would cost 4.5 times more than the proposed line and found as a matter of fact and law that the prohibition of this line was an arbitrary and unreasonable application of the ordinance, having no real or substantial relation to the public health, safety or welfare, and these findings of fact and law were not found by the Supreme Court of Ohio to be unsupported by the evidence or erroneous?

4. Is the prohibition by ordinance of construction within the City for the service in part of electric consumers outside the City an impairment of Relator-Appellant's perpetual franchise to erect overhead or underground electric lines within the City for the service of the public, in violation of Article I, Section 10, of the Constitution of the United States?

STATEMENT OF THE CASE.

Relator-Appellant, called The Illuminating Company herein, is an Ohio public utility corporation engaged in the business of producing and selling electric energy for light, heat and power purposes to all classes of consumers in the northeastern Ohio area. There are ninety separate municipalities within this service area (Appendix A, page 17, hereinafter referred to as A).

All of the properties of The Illuminating Company are completely integrated and inter-connected, constituting a single operating unit for the generation and distribution of electricity. In order to serve its customers, including the City of Euclid and its residents, Relator-Appellant must be able to provide energy wherever and whenever it is needed. This means that its generation capacity must be such as to permit it to provide full peak capacity at any given moment. Electric energy is generated at four plants located on the shores of Lake Erie (A. 18). Energy leaves the generating plants at 132,000 volts and is carried on a system of steel tower transmission lines encircling Relator-Appellant's service area, interconnecting all points and providing emergency interconnections with adjoining utilities (A. 18-19). Energy fed into the system at any point may be made available at any other point on the system (A. 19). High-voltage is required for the bulk transmission of electricity. Six 33,000 volt circuits would be required to equal the capacity of one 132,000 volt circuit (A. 19). Except for a few customers, voltage must be reduced below 132,000 volts before delivery to consumers. This is done at transmission and distribution substations (A. 19-20).

By Ordinance No. 32 of the Village of Euclid, passed July 9, 1906, the Village granted to The Cleveland Electric Illuminating Company "* * * the right to erect, con-

struct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground as may be deemed by it * * * necessary or essential to enable it * * * to transmit electricity through and along the streets, alleys and ways of the Village of Euclid, for the purpose of furnishing to said village, the general public and private persons, light, heat and power by electric current." (Section 1.) Section 2 of Ordinance No. 32 requires that the "* * * grant shall be subject to all general ordinances now or hereafter in force in said village."

This ordinance was accepted, as required by Section 6 thereof, by Relator-Appellant on July 25, 1906. Ordinance No. 32 is unlimited in time. This Court has held that such Ohio city ordinances create a perpetual franchise which is not terminable at will: *Northern Ohio Traction and Light Company v. Pontius*, 245 U. S. 574 (1918); *Ohio Public Service Co. v. State ex rel. Fritz*, 274 U. S. 12 (1927).

The City of Euclid obtains electric energy in part from the Lloyd substation of The Illuminating Company, which is located near Wickliffe, Ohio, just east of the City of Euclid (A. 22-23). Substations are not of unlimited capacity (A. 22). Tremendous industrial and population growth has occurred in and near Euclid in recent years (A. 23-24). The Illuminating Company determined in 1955 that it was necessary to build a new substation to relieve the load on Lloyd. The best way to provide such relief is to transmit energy at 132,000 volts from one of the company's generating plants at Eastlake, Ohio (east of Euclid and of Wickliffe) to a new substation in East Cleveland (west of the City of Euclid). Sixteen 33,000 volt circuits now supplying electricity in Euclid and vicinity from the Lloyd Substation will be attached to the new substa-

tion and also to Lloyd so the circuits can be supplied from both ends (A. 24-25).

The Illuminating Company proposes to transmit energy at 132,000 volts from Eastlake generating station to the new substation by overhead lines suspended by conductors from steel towers. The line will be constructed entirely on a ninety-foot wide private right-of-way along the Nickel Plate Railroad Company tracks. The length of the entire line is 7.5 miles, of which 3.57 miles is in Euclid (A. 14). The whole of the line will be built in an industrial area. The line will be suspended from steel towers placed on reinforced concrete footings at a height of from 52 to 64 feet. Each tower will be grounded for safety in the event it is struck by lightning. If a line breaks, or if a conductor is damaged, an automatic relay system breaks the circuit and de-energizes the line in 1/20th of a second (A 25-26), or before it could strike any building or other object (A. 74).

The 132,000 volt line would cross over six streets in the City of Euclid, one of which is a "paper street" which has never been constructed (A. 14). Formal application was made by Relator-Appellant for a permit to cross six streets of the City of Euclid with the conductors for the proposed 132,000 volt line on April 24, 1957 (131). The application was denied on June 17, 1957, by Resolution 147-1957 (A. 48).

Relator-Appellant filed its Petition for a Writ of Mandamus with the Court of Appeals for Cuyahoga County, Ohio, on July 9, 1957, in which it prayed for the Court to issue a writ of mandamus directed to the City of Euclid, its Mayor and Administrative Director, and the other parties respondent, requiring them to grant to Relator-Appellant a permit to erect and maintain across the six streets named therein the lines and conductors of the

132,000 volt overhead transmission line which has been described. In its Petition, Relator-Appellant asserted, *inter alia*, that it had the right by franchise contract (Ordinance No. 32) to construct such transmission line overhead and across the streets of the City of Euclid in the manner proposed, subject only to its compliance with reasonable police regulations of the City of Euclid. It asserted that the amendment to Ordinance No. 288-1956 contained in Ordinance No. 78-1957 is arbitrary and capricious and deprives Relator-Appellant of its right to use the streets of Euclid in contravention of the Constitutions of Ohio and of the United States because it has no reasonable relationship to the health, safety and welfare of the City of Euclid and its inhabitants. Further, Relator-Appellant asserted that the refusal of the Respondents-Appellees to grant the permit sought for the 132,000 volt overhead electric transmission line resulted in an impairment of the obligations owing Relator-Appellant by Respondents-Appellees under Ordinance No. 32, in contravention of the Constitutions of Ohio and of the Constitution of the United States.

Relator-Appellant's motion for the appointment of a Special Master Commissioner to hear the evidence and report findings of fact and conclusions of law was granted on October 2, 1957 and Clinton DeWitt, Esq., Professor of Law at Western Reserve University, was appointed Special Master with the consent of all counsel.

Trial was commenced to the Special Master on December 11, 1958 and concluded on January 10, 1959. Voluminous testimony was taken, most of which was directed toward the question of whether the 132 KV line for which the permit was sought would create any appreciable adverse effect upon the public health, welfare and safety of the residents of Euclid and the community in general; whether there was any rational basis for re-

quiring that the proposed 132 KV line be placed underground and whether, on a balance of interest between the City of Euclid and the Relator-Appellant, there was any rational basis founded in the protection of the public health, welfare and safety of the residents of the City of Euclid and of the community in general for denying the issuance of the permit.

After final arguments and the submission of Briefs, the Special Master Commissioner filed his report on July 21, 1958 and recommended that the Court issue the Writ of Mandamus as prayed for.

Some of the findings of the Master are:

1. The proposed 132 KV line is necessary to enable Relator-Appellant to serve the Cleveland and northeastern Ohio area, including the industrial corridor along the Nickel Plate Railroad line in the City of Euclid (A. 25);

2. Ordinance No. 32, enacted in 1906 by the Village of Euclid, created a franchise contract and enables Relator-Appellant to use the streets of Euclid for the placing of its electric lines subject to regulations enacted by the Village and its successors in the reasonable exercise of the police power, which franchise right is perpetual and not terminable at the will of either party (A. 25);

3. Ordinance No. 32 grants Relator-Appellant a franchise right to place poles and electric lines in the streets of Euclid without regard to whether the electricity carried in such a line is destined for consumers in the City of Euclid or outside the corporate limits of Euclid (A. 42);

4. Ordinance No. 283-1956 destroys part of the franchise rights of Relator-Appellant since it prohibits the issuance of a permit for electric lines which serve, wholly or in part, persons outside the corporate limits of Euclid (A. 62-63);

5. In so far as Ordinance No. 288-1956 deprives Relator-Appellant of its right to use the streets of Euclid for facilities for the transmission of electric energy to consumers located outside the city limits of Euclid, it bears no real or substantial relation to the public health, morals, welfare and safety and is not a reasonable regulation enacted in the lawful exercise of the police power (A. 65-66);

6. Ordinance No. 288-1956 is an impairment of Relator-Appellant's franchise rights and is an arbitrary and unreasonable exercise of the police power and therefore violates Article I, Section 10, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (A. 67);

7. So far as human prediction will permit, the construction and operation of the proposed 132 KV overhead line will not, in any appreciable degree, endanger the lives or property of the inhabitants of the City of Euclid or of the public in general (A. 80);

8. The cost of placing the 132,000 volt line underground will be $4,468,000, or $3,478,600 in excess of the cost of constructing the line and additional annual costs of $500,000 would be imposed on Relator-Appellant by underground construction, all of which would result in increased rates by Relator-Appellant (A. 90);

9. Even if Ordinance No. 78-1957 is deemed regulatory, it is unduly oppressive because it inflicts an intolerable hardship upon Relator-Appellant by compelling it to make an excessive, wasteful and needless investment which has no foundation in reason, and is a mere arbitrary or irrational exercise of power having no real or substantial relation to the public health, safety, morals or public welfare in its proper sense (A. 91);

10. The restraints imposed upon Relator-Appellant by Ordinance No. 78-1957 are in violation of its franchise

and present an extreme case of harshness and oppression, because the ordinance under the circumstances of this case bears no real or substantial relationship to the public health, safety, morals or welfare, and is unnecessary, arbitrary and unreasonable and invalid as being in contravention of Relator-Appellant's Constitutional rights under Section 10, Article I, and Section 1, Fourteenth Amendment of the Constitution of the United States (A. 91-92).

Relator-Appellant moved the Court of Appeals for Cuyahoga County, Ohio, for an order confirming the Report of the Special Master Commissioner and for judgment. Exceptions of Respondents-Appellees were overruled and the Report was adopted as its own by the Court of Appeals on November 19, 1958, and a writ in mandamus ordered to issue against the Respondents-Appellees (A. 133-134).

Appeal was taken to the Supreme Court of Ohio by Respondents-Appellees on January 6, 1959 where, on July 15, 1959, that Court, in an opinion concurred in by four judges, reversed the judgment of the Court of Appeals. Three judges dissented. The Supreme Court of Ohio decided the Federal constitutional questions adversely to the claim of Relator-Appellant without reviewing the record, the findings of fact, or the weight of the evidence in the proceedings before the Court of Appeals.

Although it was not suggested by any counsel, the Court considered that the question before it was whether, in the abstract, a requirement of underground construction is within the ambit of the police power. It took judicial notice of the fact that high-voltage electricity is a dangerous commodity and that high-voltage electric wires stretched across public streets constitute a danger to the traveling public, all contrary to the findings of fact as to the specific situation before the Court. The litigants had

not suggested that judicial notice of these facts should be taken. The Court refused to consider the application of the ordinance to the specific facts before it, although these facts were the ultimate questions to which the evidence of Relator-Appellant and Respondents-Appellees was directed in the trial. Upon the basis of its conclusion that high-voltage electricity is, in its nature, dangerous, the Supreme Court ruled that Ordinance No. 288-1956 as amended is a reasonable exercise of the police power. The question of whether the application of the ordinance, to deny Relator-Appellant a permit for this particular transmission line, was arbitrary and unreasonable and contrary to constitutional guarantees was not considered by the Supreme Court of Ohio.

An application for rehearing was filed by Relator-Appellant on July 28, 1959, in which it urged the Supreme Court had erred *inter alia*:

1. By taking judicial notice of the fact that high-voltage electricity is dangerous in spite of a finding of fact below, based upon evidence in the Record, that the construction of this overhead high-voltage line creates no appreciable hazard, and such action by the Supreme Court controverts the procedural due process requirements of the Fourteenth Amendment of the Constitution of the United States; and
2. By failing to determine whether the ordinances were reasonable exercises of the police power in their application to the facts of this case, and whether they deprive Relator-Appellant of its property without due process.

A rehearing was granted on August 12, 1959 and heard on October 6, 1959. On November 4, 1959, the Supreme Court of Ohio announced, *per curiam*, that it would adhere to its former judgment.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND REQUIRE PLENARY REVIEW BY THIS COURT.

1. The Supreme Court of Ohio committed reversible error by failing to determine whether the Ordinance of the City of Euclid complained of was arbitrary and unreasonable and contrary to due process in its application to the facts before the Court.

The Supreme Court of Ohio did not decide the principal Federal question urged by Relator-Appellant. An examination of the opinion of that Court (A. 1-9) demonstrates that it decided only that Ordinance No. 288-1956, as amended, in so far as it prohibits overhead construction, is, on its face, within the ambit of the police power.

Relator-Appellant does not and never has claimed otherwise. The essence of this litigation is the contention that the Ordinance is arbitrary and unreasonable in its application to the particular facts presented by the Record. The action was instituted to compel the issuance of a permit for the construction of a specific 132,000 volt overhead electric transmission line through Euclid on a private right-of-way adjacent to a railroad in an industrial area. Relator-Appellant contended in the Court of Appeals that this transmission line could and would be constructed in a manner which would create no appreciable hazard to the health, safety and welfare of the community. It was contended that to apply the prohibition of Ordinance No. 288-1956, as amended by Ordinance No. 78-1957, against all lines which do not serve Euclid residents exclusively, and against overhead lines in excess of 33,000 volts where, as here, they create no hazard, is unreasonable and without any rational relation to the ends for which the police power may constitutionally be exercised.

The Special Master Commissioner, who was the initial trier of facts, heard considerable evidence as to whether the

line in question could be constructed and maintained without hazard to the community and as to whether the Ordinance had any rational relation to the public health, welfare and safety of the residents of Euclid in so far as the Ordinance prohibited the proposed overhead transmission line. The conclusions of the trier of fact, in part, are:

1. "[The prohibition, in Ordinance No. 288-1956, against lines if they serve consumers outside Euclid] * * * neither promotes, nor even tends to promote, the public good * * *." (A. 66.)
2. "* * * the route [for the line] selected by Relator is, in every respect, an ideal one for the location of its proposed line through the city of Euclid." (A. 70.)
3. "* * * so far as human prediction will permit, the construction and operation of Relator's proposed overhead lines will not, in any appreciable degree, endanger the lives or property of the inhabitants of the city of Euclid or of the public in general." (A. 80.)
4. "* * * the excess cost of constructing the line underground is $3,478,600.00 which, approximately, is seven times larger than the cost of constructing it overhead; this increased investment * * * would mean that annual costs to Relator for having this line underground would be $500,000.00 greater than with the line constructed overhead; the impact of increased costs will be reflected in higher electric rates to the public as consumers." (A. 90.)
5. "* * * [the prohibition of this line] inflicts an intolerable hardship upon Relator by compelling it to make an excessive, wasteful, and needless investment which has no foundation in reason and is a mere arbitrary or irrational exercise of power having no real or substantial relation to the public health, safety, morals or the public welfare in its

proper sense. It is not alone the prohibitive monetary loss to Relator which here compels a finding of invalidity, but that such loss is utterly unrelated to any substantial benefit to be derived." (A. 91.)

These findings were adopted by the Court of Appeals as its own (A. 133-134).

These findings of fact and of law were not overruled, were not questioned and were not even considered by the Supreme Court of Ohio. The Supreme Court refused to review the Record. It phrased the question before it as:

"* * * is a regulation requiring high-voltage wires to be placed underground reasonable?" (169 Ohio St. 476, at 479, A. 5.)

The Court "judicially noticed" that high-voltage electricity is dangerous and ruled:

"* * * a requirement by a municipality that high-voltage wires be placed underground constitutes a reasonable exercise of the police power." (169 Ohio St. 476, at 481, A. 6.)

From this it concluded that the Ordinance did not deprive Appellant of property without due process of law and further, the exercise of the police power being reasonable, there was no impairment of the franchise of Appellant.

The three dissenting judges met the issue of whether the Ordinance would be unconstitutional as applied to the facts before it and found:

"* * * that on the record of the undisputed evidence * * * the ordinance * * * is not sufficiently related to the health, safety and welfare of the inhabitants of Euclid as to be a reasonable exercise of the police power." (169 Ohio St. 476, at 486, A. 12.)

This Court has stated on many occasions that the question of the *power* of the state to enact a regulation in the exercise of its police power and the question of the

application of that regulation may not be the same. In *Nebbia v. New York*, 291 U. S. 502 (1934), a statute of New York, which enabled a state board to fix minimum and maximum prices for milk, was upheld against the contention that the due process clause of the Fourteenth Amendment prohibited such regulations. However, the opinion expressly notes that the same type of regulation might be invalid in other circumstances:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (291 U. S. 502, at 525.)

The difference between the valid area within which the police power may be exercised and the application of power to specific circumstance is set forth in *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), wherein the Court settled the question of the power of a municipality to ordain area-class zoning. The Court said:

> "* * * when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." (272 U. S. 365, at 395.)

The issues in this case are similar to those presented in *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405 (1935). A Tennessee statute permitted the

State Highway Commission to order that grade crossing separations be constructed at the intersection of railroad and a highway where necessary for the protection of the traveling public. The statute provided that one-half of the cost of the grade separation should be borne by the railroad. The Commission had ordered the Nashville, Chattanooga & St. Louis Railway Company to construct an underpass in the town of Lexington and had assessed one-half of the cost to the railroad. The railroad filed a bill for a declaratory judgment, alleging facts which it contended demonstrated that the application of the statute to require the railroad to pay half of the costs was arbitrary and unreasonable and deprived it of its property without due process of law. The railroad did not contest the power of the state to require the separation of grades, nor did it contest the reasonableness of the cost. The trial court found most of the allegations in the bill of complaint supported and ruled that the railroad could not constitutionally be charged with one-half of the cost of the grade separation. An appeal was taken to the Tennessee Supreme Court, which reversed the decision and declined to consider the special facts alleged to show that the application of the statute was arbitrary and unreasonable. This Court reversed and remanded, saying:

> "The Supreme Court declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not 'any more' consider whether the provisions of the act in question

have been rendered burdensome or unreasonable by changed economic and transportation conditions, than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute.' A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably." (294 U. S. 405, at 414) * * *.

"Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them * * *." (294 U. S. 405, at 415.)

In *Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Holmberg*, 282 U. S. 162 (1930), the Court ruled that a Nebraska statute which permitted the Public Utility Commission to require railroads to construct underpasses when an existing crossing was unsafe was valid on its face but, as applied to the particular situation before it, where the underpass was ordered for the convenience of a landowner, there was a deprivation of the property of the railroad without due process of law.

The foregoing cases clearly illustrate that an ordinance or statute may be a valid exercise of the police power as a general regulation but it may be so arbitrary and unreasonable when applied to particular facts that it amounts to a deprivation of property without the due process of law which is protected by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Ohio failed to consider the special facts.

which were averred by Relator-Appellant and found as facts by the Court of Appeals. It is these facts which Relator-Appellant contends made the application of the Ordinance unconstitutional. The Supreme Court of Ohio has committed the same error as was committed by the Supreme Court of Tennessee in *Nashville, Chattanooga & St. Louis Railway v. Walters, supra*. The question raised by the Petition and the Record here is the question which was reserved in *Euclid v. Ambler Realty Company, supra*, and *Nebbia v. New York, supra*. Whether the Supreme Court of Ohio erred by refusing to consider the unconstitutionality of the application of Ordinance 288-1956, as amended, to the specific overhead transmission line in question is a substantial Federal question.

2. The Supreme Court of Ohio denied the Relator-Appellant the fair hearing which is protected by the due process clause when it took judicial notice of the ultimate fact in issue, contrary to an express finding of fact by the trial court.

The Supreme Court of Ohio denied Relator-Appellant a fair hearing by its decision to take judicial notice that as a matter of fact high-voltage electricity is a dangerous commodity and that high-voltage electricity constitutes a danger to the traveling public where it crosses public streets (169 Ohio St. 476, at 480, A. 5-6). The Supreme Court of Ohio failed to review the special facts which Appellant claimed made the application of the Ordinance unreasonable. It did so by ignoring the findings of the Special Master and the Court of Appeals and taking judicial notice of the fact that high-voltage electricity is dangerous. From this premise it concluded:

> "Considering the dangerous propensities of high-voltage electricity, it is our conclusion that a require-

ment by a municipality that high-voltage wires be placed underground constitutes a reasonable exercise of the police power." (169 Ohio St. 476, at 481, A. 6.)

The question of whether the high-voltage electric line for which Appellant sought a permit was dangerous was an ultimate issue of fact in the case. Most of the evidence was directed to this question and the Master concluded that this overhead line "will not, in any appreciable degree, endanger the lives or property of the inhabitants of the City of Euclid or of the public in general." (A. 80.) This was adopted by the trial court as its own finding.

This Court does not appear to have specifically ruled whether an appellate court may, consistent with the principles of procedural due process, take judicial notice of a disputed question of fact, contrary to the finding of the trier of facts, which determines the rights of the litigants. It is conceded by Relator-Appellant that if a transmission line is such a danger to the traveling public as to reasonably require its elimination, it may be validly required to be placed underground if that will accomplish the objectives sought. But the reasonableness of requiring this specific line to go underground was the subject of six weeks of litigation in the trial court and required seven hundred printed pages of transcript. Specific findings of fact by the trial court were not only overturned by the Supreme Court of Ohio—they were ignored and judicial notice in conflict with the evidence and findings was substituted therefor.

It is submitted that the action of the Supreme Court of Ohio, in taking judicial notice of the ultimate factual issue, contrary to the findings of fact of the Special Master and the Court of Appeals, is a denial of the constitutional right of a fair trial which is protected by the Fourteenth Amendment of the Constitution. It is contrary to the most

elemental requisites of fair play to subject a litigant to the risk of having undisputed evidence and findings of fact overturned at the whim of an appellate judge who might think or wish that the facts are or ought to be different than those shown by the evidence.

This Court has ruled that the fact-finding process in a trial is protected by the due process requirement of "fair play." *Morgan v. United States*, 304 U. S. 1 (1938). In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937), a decision of the Supreme Court of Ohio was reversed on the ground that it had permitted improper use of judicial notice to the extent that a litigant was denied a fair hearing. The Ohio Bell Telephone Company had filed separate rate schedules for each of its exchanges with the Public Utilities Commission of Ohio. A number of these schedules were protested by municipalities or consumers affected and, under Ohio law, the Public Utilities Commission was required to investigate the reasonableness of the protested rate schedules. If no decision on the unreasonableness of the rate schedule was made within 120 days of the filing of the protest, the utility was authorized to collect the schedule rates under bond. The Commission consolidated a number of these cases and instituted a statewide investigation of the rates of Ohio Bell. The state law required the Commission in such a case to find the rate base for the company as of "a date certain" (§ 4909.05, Ohio Revised Code), which was set as June 30, 1925.

The Telephone Company filed an inventory which was supplemented every six months. A final decision on the intra-state rate base of the utility as of June 30, 1925, was issued in January of 1934. At the same time the Commission fixed a rate base valuation for the Company for each of the intervening years, 1926 through 1933, by tak-

ing judicial notice of price trends and modifying the rate base valuation found for June 30, 1925 by the percentage of decline or increase for each year. The utility had no warning that such a procedure might be followed by the Commission. A rehearing was requested and denied. The Supreme Court of Ohio affirmed the decision of the Commission.

This Court ruled that the Commission and the Supreme Court of Ohio had denied procedural due process to The Ohio Bell Telephone Company. It was said that:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." (301 U. S. 292, at 300.)

and:

> "This is not the fair hearing essential to due process. It is condemnation without trial." (301 U. S. 292, at 300.)

The Commission and the Supreme Court of Ohio attempted to uphold the decision as an instance of judicial notice. The opinion, rendered by Justice Cardozo, noted that judicial notice may be taken of certain economic conditions such as a decline in market values but that judicial notice does not serve to show the quantum of the decline.

The Court continued:

> "The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, § 2567; 1 Greenleaf, Evidence, 16th

ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid. Cf. Shapleigh v. Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * True, the category is not a closed one. The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact *is* notorious to the community. 5 Wigmore, Evidence, § 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." (301 U. S. 292, at 301-302.)

An order of the I. C. C., fixing the division of interstate joint rates between several carriers, was appealed to this Court in *United States and Interstate Commerce Commission v. Abilene & Southern Railway Company*, 265 U. S. 274 (1924). The order was held void because it rested upon evidence not legally before the Commission. It was conceded that in making the order, the Commission had relied in part upon data taken from the annual reports of the carriers filed with the I. C. C. These reports were not formally put in evidence. The Court held the Commission's order to be void because it treated these reports as evidence. A distinction between facts which must be proved and matters which are peripheral to the issue was first noted.

> "The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice." (265 U. S. 274, at 287.)

The mere improper admission of evidence does not invalidate the order:

"But a finding without evidence is beyond the power of the Commission." (p. 288.)

and:

"Nothing can be treated as evidence which is not introduced as such." (p. 288.)

The Court of Appeals for the Sixth Circuit in *In re Bowling Green Milling Co.*, 132 F. 2d 279 (6th Cir. 1942), held that the application of the doctrine of judicial notice by the trial court under similar circumstances would be a denial of due process. That case arose from the bankruptcy of a grain elevator company. Claims were made by the holders of warehouse receipts for a return in kind of the grain represented by the receipts. The District Court took judicial notice of a "universal custom" that delivery of grain to a warehouse creates a sale and not a bailment. The Court of Appeals reversed and remanded the case on the ground that the Court erred in taking judicial notice saying:

> "Usage or custom cannot be availed of to dispense with evidence unless the fact shown thereby is certain and indisputable. Notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden or resorting to the usual forms of evidence. * * * 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'" Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 301, 57 S. Ct. 724, 729, 81 L. Ed. 1093. Here, as there, the matter is important because in the instant case the question whether the white receipt transactions were sales or bailments was the 'very point in issue.' This is another way of stating the rule that usage, to be availed of, must be well established, uniform, certain, fixed in character, and commonly known. Huston v. Peters, Hardin & Co., supra. We cannot consider, in a controversy where both parties

agree that no such custom existed, and both parties assign the ruling on this point as error, that there is no doubt concerning its existence. We recognize the superior opportunity for knowledge possessed by the District Court as to the existence of local customs or usages in Kentucky, but *to approve the application of the doctrine of judicial notice on the facts of the present case 'would be to turn the doctrine into a pretext for dispensing with a trial.'* Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra, * * *." (132 F. 2d 279, at 283-284.) (Emphasis supplied)

In *United States v. Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945), Judge Learned Hand refused to take judicial notice of certain figures contained in the "Truman Committee Report" where the fact to be noticed was in issue in the trial of the case.

"There is no reason why an appellate court upon deciding an appeal from such a judgment should not direct the district court what judgment to enter; and so it often does. Nor is there any reason why in deciding what judgment to direct, it should not advise itself from outside the record of such facts as appear to admit of no genuine dispute: i.e. should take 'notice' of whatever the district court itself might take 'notice.' Indeed, it would otherwise be impossible for an appellate court ever to dismiss an action upon the ground that it had become moot. We may, and we do, accept the figures of aluminum production in the report of the so-called 'Truman Committee' as of March, 1944, which showed that the annual production of 'Alcoa's' plant was about 828 million pounds; that the production of plants owned by the plaintiff which it had leased to 'Alcoa,' was about 1293 million pounds; and that the production of the Reynolds and Olin plants was together, 202 million pounds: a total of about 2300 million pounds. *The case is otherwise as to any facts already existing in August, 1940*, such

as the amount of bauxite in Arkansas, as to which the 'Truman Report' also contains figures. Even though we took 'notice' of these, the report would not be conclusive, or more than evidence. *We could not constitutionally substitute it for the findings of a court after a trial*: facts which a court may judicially 'notice' do not for that reason become indisputable. Wigmore, § 2567a. At most we could do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. For these reasons we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies." (148 F. 2d 416, 445-446.) (Emphasis supplied.)

A state appellate court has held that it would be error to take judicial notice of a fact which was disputed at the trial. In *Kutner-Goldstein Co. v. Workman*, 112 Cal. App. 132, 296 Pac. 313 (1931), the evidence showed that plaintiff sold a grain binder to defendant in April of 1926. When the binder did not perform satisfactorily plaintiff agreed to repair the binder within a reasonable time. Plaintiff sent an employee to defendant on May 10, 1927, to repair the binder but defendant declined the services on the ground that the grain was too ripe to be cut with a binder. Plaintiff sued defendant for the balance of the contract price. The case was tried without a jury and the trial judge found for the plaintiff on the ground, *inter alia*, that plaintiff attempted to repair the binder within a reasonable time. At the trial, defendant introduced proof that May 10, 1927 was too late to cut grain efficiently with a binder. Plaintiff did not controvert this claim with evidence. On appeal it was held that the trial court erred since May 10, 1927, on the undisputed evidence, was too late for the use of the binder in that season

and therefore the repair had not been tendered within a reasonable time. The plaintiff argued that the appellate court should take judicial notice that the harvest season in that part of California was from June 15th through July 1st. The court noted that the plaintiff had presented evidence as to the time of the harvest season in 1927, and said:

> "Under the circumstances here presented, the doctrine of judicial notice may not be invoked to contradict the direct evidence on the fact." (296 P. 313, at 315.)

In *Panama Canal Company v. Wagner*, 234 F. 2d 163 (5th Cir. 1956), the appellant complained that the trial court had taken judicial notice that tenants in the Canal Zone were "captives" in that there was no free choice of housing accommodations. The majority opinion of the Court of Appeals found it unnecessary to consider this specification of error but Judge Rives, concurring, specially discussed it. He considered that taking of judicial notice of a fact in issue in the case would have been improper had the District Court not allowed the party opposing the fact noticed an opportunity to present evidence repudiating the fact so noticed.

Taking judicial notice of a fact does not make the fact so. *Professor Wigmore* states:

> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is so because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." (9 *Wigmore on Evidence* (3d Ed. 1940), § 2567(a), p. 535.) (Emphasis by author.)

Judicial notice of a fact therefore is similar to a presumption of fact. This Court has frequently held that a litigant

is denied the fair hearing which the due process clause of the Fourteenth Amendment of the Constitution protects when a state court permits a presumption to be weighed as affirmative evidence. For example, in *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165 (1935), the railway contested a paving assessment on the ground that its property was not benefited by the improvement. The state court would not permit the railway to present evidence tending to show that it obtained no benefit because a presumption existed that the paving was beneficial. It was held that the railway had been denied procedural due process.

> "Certainly, competent proof tending to overcome a rebuttable persumption of material fact cannot be immaterial; and *the refusal of a court to* receive or *consider any proof* whatever on the subject *amounts to a denial of a hearing* on that issue, in contravention of the due process of law clause of the Constitution. * * *." (295 U. S. 165, at 171.)

In *Western & Atlantic Railroad v. Henderson*, 279 U. S. 639 (1929) a statute of Georgia was held unreasonable and arbitrary and violative of procedural due process in so far as it permitted a presumption of negligence to be given evidentiary weight.

In *Tot v. United States*, 319 U. S. 463 (1943), it was held that Congress had no power to provide, for purposes of prosecution under the Federal Firearms Act, that possession of a firearm or ammunition by a person convicted of a crime of violence, or who is a fugitive from justice, should be presumptive evidence that the firearm or ammunition was shipped, transported or received by such person in violation of the Act. Although the decision primarily turned upon the conclusion that there was no rational connection between the fact to be proved and the fact to be inferred, the Court said:

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, *it leaves the jury free to act on the presumption alone* once the specified facts are proved; unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision." (319 U. S. 463, at 469.) (Emphasis supplied.)

The Supreme Court of Ohio in the case at bar has applied judicial notice to contravene the findings of fact of the Master Commissioner and the Court of Appeals. Judicial notice was taken of the matter which is the ultimate question of fact in the litigation. The effect of the use of the doctrine by the Ohio Supreme Court is to render nugatory all of the fact finding procedure of the trial court. This clearly, in the words of Justice Cardozo, is "to turn the doctrine into a pretext for dispensing with a trial." (*Ohio Bell Telephone Co. v. P. U. C. O.*, 301 U. S. 292, at 302.)

There is no precedent in the law of the state for the procedure followed by the Supreme Court here. Section 2505.31, Ohio Revised Code, with exceptions not presently relevant, provides that the Supreme Court of Ohio is not required to pass upon the weight of the evidence in reviewing cases appealed to it. In practice, § 2505.31, Revised Code, means that the Court accepts the findings of fact of the courts of appeal unless they "are not supported by substantial evidence." *Gemco Engineering & Mfg. Co. v. Henderson*, 151 O. S. 95 (1949); *Jaffrin v. DiEgidio*, 152 O. S. 359 (1949); *State ex rel. Kobelt v. Baker*, 137 O. S. 337 (1940). The rule is followed in situations similar to that at bar in which the reasonableness of a specific application of the police power is questioned. Such was

precisely the situation in *East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379 (1957), in which the Court said:

> "Without weighing the evidence and without expressing an opinion concerning the wisdom of the ordinance, this court does hold that this record discloses substantial evidence supporting the conclusion of both lower courts that the township zoning ordinance * * * is arbitrary and unreasonable and deprives the plaintiffs of their property without due process of law * * *." (166 O. S. 379, at 384.)

The application of the doctrine of judicial notice is particularly arbitrary and unreasonable in this case because the Supreme Court of Ohio used it as the basis of its refusal to review the record to determine whether Ordinance 78-1957 is unconstitutional in its application on the facts of the case. We have shown in the first section of this Brief that such a refusal is itself a denial of due process. *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405 (1935).

To illustrate the danger of extending the doctrine of judicial notice as was done in the case at bar, assume the reverse of the findings in this case, i.e., that the trial court found, on substantial evidence, that the wires to be suspended over the five existing streets in the City of Euclid would, in fact, create a real and continuing hazard to the public safety, health and welfare. Under the rule adopted by it here, the Supreme Court of Ohio could take judicial notice that thousands of miles of such lines exist throughout the United States, and in Ohio, with many thousands of crossings over streets and highways, and that therefore the particular line must be safe and would constitute no hazard!

3. The ordinances unlawfully revoke rights granted Relator-Appellant by its franchise contract, contrary to Article I, Section 10, of the Constitution of the United States.

The Ordinance complained of, No. 288-1956, as amended by Ordinance No. 78-1957, prohibited the construction proposed by Relator-Appellant on two grounds: (1) that it was to be overhead rather than underground, and (2) that its function was not solely to serve consumers within the City of Euclid. Having decided that the construction was validly prohibited on ground (1) the Supreme Court of Ohio did not pass on whether the second ground constituted an unconstitutional impairment of Relator-Appellant's contract. If this Court should hold, as did the Court of Appeals of Ohio, that the prohibition of overhead construction is unconstitutional as to the line in question, then the question is presented whether the prohibition of construction to serve those outside the City is an unconstitutional impairment of contract. The Court of Appeals of Ohio held that it was.

Relator-Appellant contended that its rights under the franchise ordinance of 1906, No. 32, were impaired by the 1956 and 1957 ordinances, in the following manner:

1. Ordinance No 32 permits Relator-Appellant to place electric lines in the city streets without regard to whether the lines carry electricity for consumers inside or outside the city limits, but Ordinance No. 288-1956 prohibits the issuance of a permit for any electric line in the streets which will carry electricity for consumers outside the city limits;
2. Ordinance No. 32 exhausted the power of the city to consent to the placement of electric lines in the city streets and thereafter the city could only regulate

electric lines but Ordinance No. 288-1956, as amended, prohibits electric lines to serve those outside the city.

The Special Master Commissioner and the Court of Appeals found, as a matter of law, that the franchise ordinance of 1906:

> "* * * authorizes and empowers Relator to use the streets of the city of Euclid—subject, of course, to reasonable regulations—, for its corporate purposes without regard to the question of whether the electricity supplied by it serves not only the city of Euclid and its inhabitants, but also other consumers in areas beyond the corporate limits of the city of Euclid." (A. 42.)

The Master found that Ordinance No. 288-1956, in terms, prohibits the placing of any electric wires along the city streets if such wires are to be used for supplying electric energy to persons who are not inhabitants of Euclid (A. 62), and, therefore, the Ordinance does not regulate, but "utterly destroys a valuable right unconditionally granted Relator by Ordinance No. 32" (A. 63-64). Further, it was found that the prohibition of electric lines in Euclid which served other areas had no reasonable relation to the public health, safety and welfare (A. 65-66).

Relator-Appellant contended, an the Court of Appeals agreed, that the passage by Euclid of Ordinance No. 32 constituted a complete and final "consent" as contemplated by Section 4933.13 of the Ohio Revised Code. Thereafter the City of Euclid could only regulate the placement of overhead lines along and across the city Streets. It could not revoke its consent given in Ordinance No. 32.

Ordinance No. 78-1957 does not merely regulate the placement of lines along and across the streets of Euclid. It prohibits lines to serve outside the City. This is a partial revocation of the consent granted by Ordinance No.

32, and is a destruction of a right obtained by Relator-Appellant from the franchise ordinance. Moreover, in a populous highly-integrated industrial area, it is absurd.

Whether a franchise contract has been unconstitutionally impaired is a Federal question and in deciding that question the meaning and nature of the contract involved is a Federal question. *Russell v. Sebastian*, 233 U. S. 195, 202 (1914); *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 590 (1908); *Atlantic Coast Line Rd. Co. v. Goldsboro*, 232 U. S. 548, 556 (1914). Franchise contracts similar to that contained in Ordinance 32 have been held by this Court to be perpetual. *Northern Ohio Traction & Light Co. v. Pontius*, 245 U. S. 574 (1918), reversing 93 Ohio St. 466, 114 N. E. 53 (1915); *Ohio Public Service Co. v. Fritz*, 274 U. S. 12 (1927), reversing 113 Ohio St. 325, 149 N. E. 129 (1925).

It is settled that a municipal ordinance adopted under state authority is "state action" within the scope of Article I, Section 10, and Section 1 of the Fourteenth Amendment of the Constitution of the United States. *Staub v. City of Baxley*, 355 U. S. 313 (1958); *Grand Trunk Western Ry. v. City of South Bend*, 227 U. S. 544, 556 (1913).

4. An ordinance is considered a "statute" of a state for purposes of determining the appeal jurisdiction of this Court.

This Court has jurisdiction under 28 U. S. C. Section 1257(2) to review, by appeal, the decision of the Supreme Court of Ohio. Appellant has questioned the validity of Ordinances No. 288-1956 and No. 78-1957 of the City of Euclid as being repugnant to Article I, Section 10, and the Fourteenth Amendment of the Constitution of the United States, and the decision of the highest court in the State is in favor of the validity of the Ordinances.

The cases clearly hold that an ordinance of a municipality is a "statute of any state" as that term is used in the statute. This was settled in *King Manufacturing Co. v. City Council of Augusta*, 277 U. S. 100 (1928), where an appeal was taken from the decision of the state supreme court upholding a city ordinance claimed by appellant to be an impairment of contract. It was ruled here that "statute" must be interpreted broadly as including any legislative act:

> "It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane." (277 U. S. 100, at 103-104.)

The rule of the *King Manufacturing Co.* case was adhered to over the objection of appellee in *Jamison v. Texas*, 318 U. S. 413 (1943), where the appeal was from the decision of the Texas Supreme Court, upholding an ordinance of the City of Dallas. In a number of recent cases this Court has held it had jurisdiction under 28 U. S. C., § 1257(2), to entertain an appeal from a state supreme court where that court upheld a municipal ordinance claimed by appellant to be repugnant to the Constitution of the United States. See *Breard v. City of Alexandria*, 341 U. S. 622,

625 (1951); *Poulos v. State of New Hampshire*, 345 U. S. 395, 402 (1953); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 79 (1947).

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF OHIO.

THE STATE, EX REL. THE CLEVELAND ELECTRIC ILLUMINATING CO., APPELLEE, V. CITY OF EUCLID ET AL., APPELLANTS.

Municipal corporations—Powers—Regulations for installation of electric power lines—Ordinance requiring underground installation of lines carrying high voltage—Reasonable regulation.

1. A municipal corporation may prescribe reasonable regulations for the installing of electric power lines through or into its territorial limits and may withhold its consent for the installation of such power lines until such regulations are complied with. (Sections 715.27, 4933.13 and 4933.16, Revised Code, construed and applied.)
2. A municipal ordinance which provides that all electric power lines installed within or through the municipality's territorial limits and carrying greater voltage than 33 KV (33,000 volts) shall be installed underground is not an unreasonable regulation unrelated to the health, safety and welfare of the inhabitants of the municipality.

(No. 35907—Decided July 15, 1959.)

APPEAL from the Court of Appeals for Cuyahoga County.

This action in mandamus originated in the Court of Appeals, wherein the relator, The Cleveland Electric Illuminating Company, seeks to compel the respondent city of Euclid to issue a permit for the construction of an overhead electric transmission line to carry electrical energy at a voltage of 132,000 volts over certain streets in the respondent city.

The city refuses to issue such permit primarily for the reason that the application is for a permit to construct *overhead* transmission lines carrying electrical energy in excess of 33,000 volts, which would be contrary to ordi-

nance No. 78-1957 of such city requiring such lines to be placed *underground*. That ordinance reads as follows:

"Whereas, this council finds that it is necessary to provide for the safety, welfare, comfort and convenience of inhabitants of the city of Euclid, and

"Whereas, this council further finds that increasingly higher voltages of electric power are being carried to and through urban centers and cities such as the city of Euclid, and that provision must be made whereby such power lines are so constructed and maintained as to provide the greatest safety factors for persons using the public streets and ways, as well as those persons occupying private property and to provide quiet and peaceable possession of the same, and

"Whereas, making provision for such high tension lines also provides for the usual daily operation of municipal departments.

"Now, therefore, be it ordained by the Council of the City of Euclid, state of Ohio:

"Section 1: That ordinance No. 288-1956, passed December 3, 1956, be and the same is hereby amended and supplemented by adding the following new section, to be known as Section 2.1, which shall read as follows:

"Section 2.1: *Permit issued by council.*

"It shall be unlawful to construct or maintain an electric power line carrying greater voltage than 33 KV, without first obtaining a permit therefor from the council. No charge shall be made for such permit. The applicant shall first file plans and specifications, which shall show the course and route of such proposed line in or through the city of Euclid. Such line shall be installed underground, at a minimum depth of six feet below grade. It shall be backfilled by and laid in at least six inches of sand. It shall be standard underground pipe-type cable, lead covered, to be no less than the standard minimum A. E. I. C.

specification as to voltage, herein adopted. Such line shall be encased in an enclosed sealed and welded steel pipe with protective sheath, having a somatic coating. Such pipe may either be oil or gas filled and shall be capable of withstanding any maintained pressure."

The Court of Appeals referred the case to a special master who found such ordinance unconstitutional on the basis that it is not a lawful exercise of the police power and recommended that a writ of mandamus issue. The Court of Appeals adopted the special master's report as its conclusions of law and fact and issued the writ.

The cause is before this court on an appeal as of right from the judgment of the Court of Appeals.

Mr. Lee C. Howley, Mr. Donald H. Hauser, Messrs. Squire, Sanders & Dempsey, Mr. John Lansdale and Mr. Donn B. Miller, for appellee.

Mr. John F. Ray, Jr., director of law, *Mr. Paul H. Torbet* and *Mr. Perry L. Graham*, for appellants.

MATTHIAS, J. The determinative issue in this case is whether a municipal ordinance requiring electric power companies to place wires carrying in excess of 33 KV (33,000 volts) underground constitutes a valid exercise of the police power.

There is no question that such companies are subject to reasonable regulation in relation to the construction of their lines.

Section 715.27, Revised Code, provides:

"*Any municipal corporation may:*

"* * *

"(B) *Regulate the construction and repair of wires, poles, plants, and all equipment to be used for the generation and application of electricity* * * *." (Emphasis added.)

Section 4933.13, Revised Code, provides:

"A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. *With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity* for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires." (Emphasis added.)

Section 4933.16, Revised Code, provides:

"No person or company shall place, string, construct, or maintain a line, wire, fixture, or appliance of any kind to conduct electricity for lighting, heating, or power purposes through a street, alley, lane, square, place, or land of a municipal corporation *without the consent of such municipal corporation.*

"This prohibition extends to all levels above or below the surface of such public ways, grounds, or places, as well as along their surfaces, but not to rights received through and exercised under proceedings of a Probate Court prior to February 26, 1910.

"The penalty provided by Section 4933.99 of the Revised Code for a violation of this section is cumulative to other means of enforcing this section open to the municipal corporation, by way of injunction or otherwise, and is not exclusive." (Emphasis added.)

As may be seen from the above sections, not only are municipal corporations specifically empowered to impose reasonable regulations in respect to the construction of the lines of such electric power companies, but such sections

also provide that the consent of the municipality must be obtained before such lines are constructed. The requirement of consent necessarily implies that the municipality may impose reasonable regulations and conditions as to such construction as a condition to its consent. To interpret such requirement otherwise would be to hold that the requirement of consent is a mere empty thing of no meaning. This we cannot do, since it is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.

It being determined that a municipal corporation may impose reasonable regulations upon an electric power company in the construction of its lines, is a regulation requiring high-voltage wires to be placed underground reasonable?

The test for determining whether certain legislation constitutes a valid exercise of the police power was set out by this court in the first paragraph of the syllabus of *Teegardin v. Foley*, 166 Ohio St., 449, 143 N. E. (2d), 824, as follows:

> "In order to constitute a valid exercise of the police power, legislation must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation. (Paragraph three of the syllabus of *Froelich v. City of Cleveland*, 99 Ohio St., 376, approved and followed.)"

Judicial notice may be taken that high-voltage electricity by its nature is a very dangerous commodity, and

that high-voltage electric wires stretched across public streets constitute a danger to the traveling public. 18 American Jurisprudence, 508, Electricity, Section 112.

The fact that in our present civilization electricity has become a necessity and is a matter of everyday use in no way affects its dangerous character. Modern science and engineering have perfected safety devices which have made it usable with a reasonable degree of safety. However, so-called high-tension wires, carrying heavy-voltage current, still remain a source of great danger. While methods of installing and maintaining overhead lines have improved and mechanical safety devices have been perfected which have reduced the danger, the danger is still there. Mechanical safety devices fail, and, in spite of engineering advancements, metal in electric-power-line towers may still crystallize, insulators fail or, for some unexplainable reason, such a tower may give way creating a tremendous hazard to life and property.

Relator contends that its lines will go through an industrial district, and that, therefore, there is no reason to require underground installation. If our problem was purely a question of aesthetics, relator's arguments would be valid. However, we are not concerned primarily with the aesthetic but must direct our attention to the question of public safety. The danger created by high-voltage wires in an industrial district, with its storage tanks of inflammable and explosive materials, the moving of heavy trucks, cranes and other machinery and its heavy population of workers, is equal to if not greater than in residential districts.

Considering the dangerous propensities of high-voltage electricity, it is our conclusion that a requirement by a municipality that high-voltage wires be placed underground constitutes a reasonable exercise of the police power.

The last issue which must be determined is the effect of the original franchise granted relator by the municipality in 1906.

The pertinent parts of the ordinance (No. 32) which grants the franchise are as follows:

> "An ordinance granting the Cleveland Electric Illuminating Company and its successors, the right to erect, construct, maintain and use the necessary poles, wires, conduits and such other fixtures and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys and ways of the village of Euclid, for the purpose of furnishing to said village, the general public and private persons, light, heat and power by electric currents.
>
> "Section 1: Be it ordained by the Village Council of the Village of Euclid, State of Ohio, that the Cleveland Electric Illuminating Company and its successors, be, and they are hereby granted the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances overhead and underground, as may be deemed by it or them necessary or essential to enable it to transmit electricity through and along the streets, alleys and ways of the village of Euclid for the purpose of furnishing to said village the general public and private persons, light, heat and power by electric currents.
>
> "Section 2: All wires used by the Cleveland Electric Illuminating Company shall be properly insulated, and shall comply with all state regulations and ordinances to be passed by this village requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the city of Cleveland. *And this grant shall be subject to all general ordinances now or hereafter in force in said village.*

"Section 3: The Cleveland Electric Illuminating Company or its successors shall, before any work is commenced, submit to the proper officers of the village, plans, showing the work it proposes to do in the erection of poles, wires, appliances, or in the building of conduits, *and receive a proper permit therefor each time before any new work shall be undertaken*, and they shall be kept upon file in the office of the village clerk with a proper record, showing that a permit for their construction has been entered, and *thereupon* the Cleveland Electric Illuminating Company or its successors shall have the right to proceed with its or their work in accordance with the plans and specifications placed on file by it or them." (Emphasis added.)

It is relator's contention that such franchise constitutes a contract, and that the municipality can impose no regulations or conditions as to the construction of lines which are not provided therein.

We assume, without deciding, that the franchise evidenced by the ordinance is a contract, and we note that the emphasized portions of the ordinance specifically reserve to the municipality the right to impose additional regulations by ordinance in the future. However, even had such reservations not been specifically included in the contract, it is nevertheless subject to police regulations. In the third paragraph of the syllabus of *City of Akron v. Public Utilities Commission*, 149 Ohio St., 347, 78 N. E. (2d), 890, this court said:

"*All contracts* are subject to the paramount rights of the public, and *all contracts* the subject matter of which involves the public welfare *will have read into them* with the same force and effect, as if expressed in clear and definite terms, *all valid public regulations* then existing or *thereafter enacted*, essential *for the promotion of the health, safety and welfare of the people*. The authority of the state to exercise its gen-

eral police power must be recognized as an implied condition of *any* such contract." (Emphasis added.)

Thus, even though this franchise were a contract, it would still be subject to regulations adopted as a valid exercise of the police power, and, we having determined that the ordinance in question constitutes a valid exercise of the police power, the contract would be subject thereto.

Since under the terms of ordinance No. 78-1957 relator has no right to erect power lines carrying more than 33,000 volts above ground, it has no right to the relief prayed for.

In conclusion, we find:

I. Sections 715.27, 4933.13 and 4933.16, Revised Code, specifically provide that by virtue of its police power a municipality may prescribe reasonable regulations for the installing of electric power lines through or into its territorial limits and may withhold its consent for the installation of such power lines until such regulations are complied with.

II. A municipal ordinance which provides that all electric power lines installed within or through the municipality's territorial limits and carrying greater voltage than 33 KV (33,000 volts) shall be installed underground is not an unreasonable regulation unrelated to the health, safety and welfare of the inhabitants of the municipality.

For the reasons herein set out, the judgment of the Court of Appeals is reversed.

Judgment reversed.

ZIMMERMAN, TAFT and BELL, JJ., concur.

DISSENTING OPINION IN THE SUPREME COURT OF OHIO.

WEYGANDT, C. J., HERBERT and PECK, JJ., dissent.

HERBERT, J., dissenting. There is no dispute among the members of the court as to the general law applicable to this particular case. While the majority opinion cites 18 American Jurisprudence, 508, Section 112, to the effect that judicial notice may be taken that high-voltage electricity is a very dangerous commodity, and that high-voltage electric wires stretched across public streets constitutes a danger to the traveling public, it is also noted in 20 American Jurisprudence, 132, Section 129, that "a court will judicially notice that electricity can be safely conducted and used as an agent for the production of light, heat, and power."

I agree with paragraph one of the syllabus but dissent from paragraph two and, therefore, the judgment.

In the case of *City of Cincinnati v. Correll*, 141 Ohio St., 535, 49 N. E. (2d), 412, Bell, J., stated, at page 539, what the writer considers to be a sound summation of the legal principle involved:

> "If an enactment is referable to the police power, to be valid, the court must be able to say that it tends in some substantial degree to the prevention of offenses, or the preservation of the health, morals, safety or general welfare of the public. Therefore, if it is apparent that there is no plausible, reasonable and substantial connection between the provisions of the act and the supposed evils to be suppressed, there exists no authority for its enactment."

The sole issue here is whether the recent ordinance of the city of Euclid requiring electric power lines carrying greater voltage than 33 KV to be placed under ground is a reasonable exercise of the police power of the city. Here, the proposed transmission lines carrying 132,000 volts

would be supported on steel towers placed on reinforced concrete footings, with the average height of each tower to be 85 feet. The clearance between the conductor lines and ground levels where they would cross streets would vary from 52 to 64 feet, and each tower would be completely grounded for safety purposes to protect against lightning striking a tower.

Most of the factual evidence presented before the master was undisputed. The master found that an automatic relay system would cut off the flow of electricity through the conductors and de-energize the line in about 1/20 of a second it it became damaged or severed, and that before a line could strike the ground it would be rendered harmless. Each line is a little less than one inch in diameter, most of the strands making up the line being aluminum and having an inner core of plow steel which substantially increases the strength of the line but is not itself a conductor of electricity.

The master's report shows that a wire carrying 23 000 volts is of far less tensile strength than that of a conductor of a 132,000-volt line, and, of course, it is obvious that wooden poles may be blown down by high winds or knocked down in contrast to the high towers, which the relator here proposes to erect entirely on its presently owned right of way.

The master reported that the relator introduced evidence that,

> "in 1953, the Cleveland area was subjected to a tornado, yet it caused no damage to any of relator's 132,000 volt steel tower lines. Furthermore, relator's evidence shows that there are 428 roads and streets which are crossed by 877 single circuit conductors of its existing 132,000 volt lines—502 of which are within the confines of municipalities—and that its 30 years of record keeping disclose no instances of such lines being down on any roads or streets. It

should, perhaps, be mentioned that in comparison with the aforesaid 877 crossings, there will be only 12 such crossings for relator's proposed tower line in the city of Euclid, of which two circuit crossings are over a 'paper' street which is not yet constructed. There is, of course, no danger of trees falling across the proposed line since there are none standing on the right of way along which the line will pass. Relator's evidence did disclose, however, that in its 30 years of record keeping there were nine instances of accidents affecting its 614.19 circuit miles of 132,000 volt lines. Some of these were most unusual. For example, in 1928 a careless aviator flew into a line and brought down two conductors. In 1929, an oil pipeline near a tower sprang a leak. The oil was ignited by sparks from a passing locomotive and the heat from the oil fire dropped one of the conductors. In 1933, a conductor was brought down by a rifle bullet. In 1955, there were two cases where the lines had been dynamited by vandals. In two instances, not in the Cleveland area, a line came down due to an unusually heavy formation of ice. The evidence discloses, however, that at those times the ultimate strength of the conductors which came down was only 9,000 pounds; that the ultimate strength of the conductors of the proposed line is 25,000 pounds. * * * In none of these instances, except in the case of the aviator, was anyone injured and no person's property, other than relator's, was damaged."

Suffice to say that on the record of the undisputed evidence presented in this particular case, the ordinance under consideration here, which forbids an overhead installation such as proposed with all the modern safeguards, is not sufficiently related to the health, safety and welfare of the inhabitants of Euclid as to be a reasonable exercise of the police power.

A court should not, of course, interpose its judgment as to reasonableness of an enactment above the legislative

determination unless the enactment appears clearly unreasonable. Here, the evidence leaves no other conclusion open to the writer.

Each case such as this finally comes down to an issue as to what is a proper balance between public interest and private rights. What the future may hold with respect to atomic energy plants, and perhaps as yet undreamed of developments, is, of course, open to conjecture, but, in the instant case, I would affirm the judgment of the Court of Appeals.

WEYGANDT, C. J., and PECK, J., concur in the foregoing dissenting opinion.

OPINION OF THE SUPREME COURT OF OHIO AFTER REHEARING.

(No. 35907—Decided November 4, 1959.)

APPEAL from the Court of Appeals for Cuyahoga County.

ON REHEARING.

Per Curiam. Upon a reconsideration of this case, formerly reported in 169 Ohio St., 476, the court adheres to its former judgment.

Former judgment adhered to.

ZIMMERMAN, TAFT, MATTHIAS and BELL, JJ., concur.

WEYGANDT, C.J., HERBERT and PECK, JJ., dissent.

REPORT OF THE SPECIAL MASTER COMMISSIONER, ADOPTED BY COURT OF APPEALS AS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed July 21, 1958.)

Clinton DeWitt, Special Master Commissioner. This is an action in mandamus filed in this Court on the relation of the Cleveland Electric Illuminating Company against the city of Euclid, Ohio, and its Mayor, Administrative Director, Director of Law, and the members of its Council, praying for a writ of mandamus requiring the issuance to Relator of a permit to cross six designated streets in the city of Euclid, with the conductors of a 132,000 volt steel tower electric transmission line. Relator proposes to construct such line along the Nickel Plate Railroad from Relator's Lloyd substation in the city of Wickliffe, Lake County, Ohio, through the cities of Euclid and Cleveland to a new substation to be constructed adjacent to the Nickel Plate Railroad near Collamer Avenue in the city of East Cleveland, Ohio. The length of the proposed line is approximately 7½ miles, and the portion thereof which is within the geographic limits of the city of Euclid is 3.57 miles. The line will be constructed on private right of way. No towers, poles, guy wires or other fixtures and facilities will be erected on public property, or within any street in the city of Euclid. However, conductors of wires will cross six duly dedicated public streets of the city of Euclid, one of which—a "paper street"—has never been constructed, at a distance of from 52 to 64 feet above the surface of such streets. No demand is made in the petition for a permit to erect towers or to transmit electric energy because, as Relator claims, none is needed. Relator also claims that the permit which is sought in this case was refused by Respondents solely because certain ordinances of the city of Euclid, in existence at the time the formal application for

the permit was made, prohibited the construction above ground of transmission lines which would carry electric energy of more than 33,000 volts, and further prohibited the construction of overhead lines of any kind if such lines were in whole or in part for service to any person outside the geographic limits of the city of Euclid. The paramount issue in the case is the validity of those ordinances.

Before proceeding to report my findings of fact and of law, there are two matters which should be mentioned. (1) I wish to advise the Court that prior to the trial of this case, at the request of counsel on both sides and in their company, I made an inspection of the right of way through which Relator's proposed overhead transmission line would pass. Special attention was given to the areas where the conductors, at high altitudes, would cross six streets in the city of Euclid; also to particular buildings situated near the route of the proposed line. (2) Shortly before this case was set down for trial, Respondents moved for an order dismissing the petition and for a judgment in their favor on the ground that this Court does not have jurisdiction of the subject matter of the action. I overruled the motion and will briefly set forth my reasons. Article IV, § 6 of the Constitution of Ohio confers upon the court of appeals original jurisdiction in mandamus. The facts asserted by Relator, all of which must be accepted as true for the purpose of disposing of Respondents' motion, show that Relator has the right to proceed with this action in mandamus and has a clear right to the writ requested. It is alleged, among other things, that Relator has acquired a vested constitutional right of which it may not be deprived by the action of Respondents; that the injury resulting from an enforcement of the ordinances of the city of Euclid, which are set forth in Relator's petition, would inevitably cause the impairment of Relator's property rights and in-

calculable harm to its business, for which it has no adequate remedy in the ordinary course of law. Relator avers that the restrictions imposed by the aforesaid ordinances are unreasonable, arbitrary, and capricious for the reason that they have no reasonable relationship to the public health, safety, morals, and general welfare. Clearly, in the light of the above allegations, which are deemed to be true, Relator may have direct recourse to this Court. The validity of the ordinances is, therefore, the primary issue here and this, necessarily, is a question of fact as well as of law. It cannot properly be determined except upon the evidence presented upon the trial of the case. Furthermore, this is a case of great interest to Relator and to the public in general. It should not be disposed of on a motion. I felt, therefore, that Relator should be granted full opportunity to prove or attempt to prove the facts alleged in its petition and Respondents should be given an equal opportunity to present their side of the controversy so that I could dispose of the matter upon its merits. It should, perhaps, be noticed that the Court itself had previously ruled against Respondents upon their demurrer to the petition which was based upon the claim that the petition did not state facts which show a cause of action.

The record of this case is voluminous. In addition to many lay and expert witnesses, the record includes more than 100 exhibits consisting of aerial and ground photographs, land-use and zoning maps, statistical records, governmental documents and regulations (federal, state, and municipal), and many graphs, charts, diagrams, and other projections.

As a preface to my special findings of fact, I wish to comment generally upon Relator's conduct of its business as revealed by the evidence. Relator provides electric

energy for light, heat and power purposes to all classes of consumers in the Counties of Ashtabula, Lake, Geauga and Cuyahoga, and in parts of Lorain County. Such service is provided in ninety separate municipalities. The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy is that all of the properties of Relator involved in this case are thoroughly integrated and interconnected, constituting a vast yet single operating unit for the generation and distribution of electric energy. In order to adequately serve its customers, residential, commercial, and industrial, and the corporate city of Euclid itself, Relator must be able to provide electric energy wherever and whenever it is needed. The process of supplying electric service is a highly mechanized operation, and the product must be manufactured and delivered at the instant the customer desires it. No storage of the product is possible, as in the case of the gas industry, for example. This means that the electric utility plant, that is, generating stations, transmission lines, substations, and distribution circuits must be of sufficient capacity to supply the maximum demand that all the utility's customers may make for service at any time. Obviously, the demands fluctuate. In some areas, the demands may be constant, or excessive at certain hours; in others, they may be intermittent, or relatively small; nevertheless, the electric energy must always be available. The evidence plainly shows that Relator has designed, constructed, and maintains a remarkably efficient and integrated "bulk power system" which reasonably assures every consumer the electric energy he requires and at the moment he requires it.

Relator introduced a very considerable amount of evidence showing its existing properties, facilities, and operations. The importance of this evidence cannot be over-

estimated. Without such basic information concerning the conduct of Relator's business, the evidence pertaining to the purpose and need of its proposed high voltage transmission line cannot be fully understood and evaluated. I find, therefore, the following facts to be indisputably established. Electric energy is generated at Relator's four large generating plants located on the shores of Lake Erie —an inexhaustible supply of water being essential to their operation—near Ashtabula in Ashtabula County, Eastlake, in Lake County, East 70th Street in Cleveland, Cuyahoga County, and Avon in Lorain County. Each of these power plants is located where it best serves two purposes: (1) it becomes a part of an entire system of supply so that all of the capacity of the system is not concentrated in one place, thus insuring against the possibility of the loss of all service with the loss of any one of these plants; (2) it has an economic function as well in that by bringing the plant closer to the area it serves, distribution of its output can be accomplished at less cost and with less transmission.

Electric energy leaves the generating plant at 132,000 volts and passes into the main transmission lines of Relator for ultimate distribution to Relator's 450,000 customers or more throughout the entire system. Except in a few congested areas where it would be physically impractical to construct and maintain them, these high voltage transmission lines are overhead lines and are carried on steel towers. Starting from the east at the Ashtabula plant and terminating in the west at the Avon plant, they form a ring encircling all of the areas served by Relator. The farthest areas through which these lines pass is approximately 17 miles directly south from the shore line of Lake Erie. Thus, these tower lines, the "backbone" of the entire bulk power system, tie all of the power plants together and provide emergency inter-connections to adjoining electric utilities

so that power available at any point may be fed into the system and be made available to all other parts of the system.

High voltages are necessarily utilized for the bulk power system. Where large quantities of electric energy are to be transported, it must be done at high voltage. For example, it would require twelve 33,000 volt circuits to equal the capacity which is provided by two 132,000 volt circuits on a steel tower transmission line. The reduction in line losses of electricity by transmission on one capacious line instead of twelve limited ones; the amount of space which would be required by twelve lines instead of one; and the high costs of duplication of facilities, all require that the main transmission lines transport electric energy at 132,000 volts.

Relator has a few customers who take energy from its main transmission system at 132,000 volts and provide their own transformation to lower voltages which may be utilized. Because these customers take such large quantities of electric energy, it is more economical to serve them at this level than to build a number of low voltage lines which would otherwise be required to bring in a sufficient quantity of energy. For most of Relator's customers, however, lower voltages than that used in bulk transmission must be provided. For this purpose Relator's 132,000 volt transmission system includes at strategic locations throughout the entire area facilities for transformation in what are called "transmission substations." No electricity is generated at these substations; but without them Relator could not fulfill its franchise obligation of proper service to the public.

The next level of service below the system pool of energy at 132,000 volts is at 33,000 volts. Energy arriving at the transmission substations at 132,000 volts is trans-

formed down to 33,000 volts. A number of the larger industrial consumers in the city of Euclid take energy at that level. In the area between the Lloyd substation in the city of Wickliffe and a proposed substation to be erected in the city of East Cleveland, there are seventeen customers which take energy directly at 33,000 volts. The majority of customers, however, must be served at lower voltage, as illustrated by the fact that there are eleven customers in the city of Euclid which take energy at 33,000 volts, whereas the total number of customers in the city of Euclid is about 17,000.

In order to serve these 17,000 customers, energy at 33,000 volts from the transmission substations is transmitted to other transformer stations called "distribution substations." At the present time there are three substations of this type and another is under construction. One of them is near Babbitt Road in the city of Euclid and the only other one in the city of Euclid is the Jasper substation now in the process of construction. Although this substation is physically in the city of Euclid, it derives its supply of electricity from a line through the city of Cleveland. Another substation is in the city of Cleveland and just at the outskirts of the city of Euclid. All of these substations provide service to customers both in and outside of the city of Euclid. Lastly, there is a substation in the city of East Cleveland and its supply lines through the city of Euclid also serve customers in the latter city. In these substations energy is transformed down to 4600 volts. The lines leaving the distribution substations and carrying 4600 volts are the feeders or distribution primaries. These are the wires commonly seen on poles along the streets or, in many residential areas, along rear lot lines. A large number of customers take energy at this voltage for industrial and commercial purposes. For the

majority of customers, however, 4600 volts is higher than the voltage normally required for homes or small commercial installations; it must, therefore, be still further reduced. This is accomplished by means of small transformers which are placed on poles at appropriate intervals along streets or rear lot lines. These reduce the voltage to 220 or 110, as the case may be, after which the energy is taken directly to the customers in wires which are called distribution mains or secondaries.

The foregoing summary of facts portrays the essential facilities and operations of Relator's bulk power transmission system. It has not been an easy task to compress into a few paragraphs the vast amount of evidence which bears upon this subject; nevertheless, I have assayed it because, as I have said before, a comprehensive description of Relator's entire system is necessary to a proper understanding of the facts which pertain to Relator's proposed tower transmission line, a part of which would pass through the city of Euclid.

Before reporting my findings of fact concerning the purpose and need for Relator's proposed overhead line, it should, perhaps, be first observed that all of Relator's facilities of the bulk power transmission system are placed, and all of its operations occur, without reference to political boundaries. For example, the interconnection between the generating plant in the city of Eastlake and the Pleasant Valley transmission substation in the city of Independence, of which the construction project here in question is a part, passes through areas of Lake and Cuyahoga Counties, and the municipalities of Eastlake, Willowick, Wickliffe, Euclid, Cleveland, East Cleveland, Cuyahoga Heights, Valley View and Independence. The proposed tower transmission line at issue in this case, namely, the line from the present Lloyd substation to the new

Jordan substation, is located in two counties and in four municipalities, Wickliffe, Euclid, Cleveland, and East Cleveland.

From the evidence introduced in this case, I find the following facts to be clearly established. Since 1947, the city of Euclid and vicinity, as well as other areas, have been supplied with electricity from the Lloyd substation which is located just east of the city of Euclid in the city of Wickliffe in Lake County. This substation was built in 1947. Prior to that time, customers in the city of Euclid, as well as those in the territory surrounding it, were served from the substation in the city of East Cleveland, which, in turn, received its electric energy from the Northfield transmission substation which is located in the southern part of Cuyahoga County and more than twelve miles from the southernmost boundary of the city of Euclid. From the testimony of Joseph Tesar, manager of Relator's system planning department, it appears that substations are not of unlimited capacity and that where the magnitude of the demand upon a particular substation approaches the practical limits of its capacity, it becomes necessary to provide a new or supplementary source of supply. A brief history of the Lloyd substation affords an excellent illustration of the application of this principle. When, in 1953, the Lloyd substation was nearing the sound limitation of its capacity, Relator built the Mayfield substation, located some nine airline miles from the Lloyd substation, in order to lessen the load upon the latter. However, the demand for electric energy increased so rapidly that by 1955 it became necessary to again relieve the Lloyd substation. To accomplish this, another substation was built. It is located about eighteen miles east of the Lloyd substation. Nothwithstanding this additional relief, the demands upon the Lloyd substation continued to grow so fast that it is now neces-

sary to relieve it again. Perhaps it is fitting to mention here that, according to the testimony of Mr. Tesar, approximately one-half of the load supplied by the Lloyd substation is distributed in the city of Euclid.

The evidence plainly points up the fact that the present necessity for again relieving the Lloyd substation is due primarily to the incredible growth of the electric energy requirements in the industrial corridor along the Nickel Plate Railroad tracks, for which the industrial consumers in and near the city of Euclid are mainly responsible. The demands of individual consumers in the areas served by Relator also have increased substantially in recent years. It is common knowledge that householders are prone to install in their homes electric refrigerators, deep freeze units, washing machines and dryers, vacuum cleaners, space heaters, air-conditioning units, stoves, fans, wood-working tools, radio and television sets, and many other electrical appliances and gadgets. Unquestionably these, too, have added greatly to the load upon Relator's system. In this connection, it should be noticed that throughout the entire country the demand for electric energy has increased by leaps and bounds. I take judicial notice of the fact that, according to the records of the Federal Power Commission and of the United States Bureau of the Census, the number of customers in 1902 was 583,000 and the Kwhr sales were 2,000,000; that in 1954, the number of customers was 51,215,000 and the Kwhr sales were 410,904,000,000. The Federal Power Commission, in 1935 summed up the changes brought about by electricity as follows: "Modern civilization would collapse with the failure of the sources of electric light and power."

Furthermore, the evidence shows a rapid growth in the population of the city of Euclid. This is indicated by

the fact that in the years 1940-1955, the population increased from 20,000 to 60,000; and there is good reason to expect that it will reach 100,000 by 1965. Industrial plants in this area also are rapidly expanding. There have been constant and substantial increases in the quantities of electric energy required by large industrial corporations such as Addressograph Multigraph, Austin, Chase Brass, Euclid Road Machinery, Fisher Body, General Electric, General Motors, Lincoln Electric, Reliance Electric and Engineering, and Thompson Products in the city of Euclid; also American Stamping, Cleveland Crane and Engineering, Eaton Manufacturing, Lubrizol, Ohio Rubber, Parker Appliance, the Cleveland Nottingham Pumping Station and others in adjacent areas. In the city of Euclid alone, in a four year period, 1952-1956, the industrial increase in loads of some of those companies varies from a minimum of 16 percent to a maximum of 60 percent.

The testimony of several officials of the Relator and of consulting engineers whom it called to testify as experts shows conclusively that the size and importance of the overall demand for electric energy in this area require the improved reliability of service and that this can be provided by two sources of supply as contemplated by Relator's proposed overhead transmission line.

In 1955, after Relator's system planning and engineering staffs had made a thorough study of the situation, it was decided that the best way to solve the problem of transporting the required additional quantities of electric energy into this area is by bringing it at 132,000 volts directly from the Eastlake generating plant to a new substation (Jordan) to be built adjacent to the Nickel Plate Railroad tracks near Collamer Avenue in the city of East Cleveland. In November, 1955, Relator secured from the federal Office of Defense Mobilization a Certificate of Ne-

cessity for the construction of the line. It is expected that the Thompson Products Company, in the city of Euclid, will be served directly from the proposed line at 132,000 volts. Other than this, there will probably be no direct connection to this line in the city of Euclid.

Reliable evidence shows that the relief of the Lloyd substation will be accomplished in substantial part by attaching sixteen 33,000 volt circuits now supplying electric energy in the city of Euclid and vicinity out of the Lloyd substation also to the new Jordan substation so that these two lines will be supplied from both ends. Feeding these lines in this manner provides relief to the Lloyd substation, and doubles the capacity of these lines. The evidence also shows that six times as many 33,000 volt circuits would be required to produce the same capacity as the proposed 132,000 volt circuit. Mr. Tesar testified that "the sheer mass of the facilities that would be required on that level [33,000 volts] would be rather overwhelming and there is no room nor any sound engineering basis for developing a plan showing such facilities."

There can be no valid dispute about the foregoing facts. Respondents produced no reliable evidence to contradict them. I find, therefore, as a matter of fact, that the proposed line is necessary and practical for the continuance of adequate supply of electric energy to the Cleveland-Northeast area and to meet the ever-increasing demands in the city of Euclid, especially in the industrial corridor along the Nickel Plate Railroad tracks.

The proposed transmission lines carrying 132,000 volts will be supported on steel towers placed on reinforced concrete footings. A typical line tower consists of approximately 8250 pounds of steel; however, if the line has to turn an angle, a heavier structure—an anchor tower—is required. The ground area occupied by a tower may

vary from 250 to 720 square feet. The average height of a tower is 85 feet. The distance from the ground level to the first insulator is about 65 feet, but, where higher clearances are necessary, extensions from 24 feet to 60 feet may be added to the 85 feet tower itself. Clearances between the conductors and ground levels where the lines cross streets are ample, varying from 52 to 64 feet. Each tower is adequately grounded. This is done precisely for safety purposes in the event lightning would strike a tower. Should this happen and the conductors become damaged or severed, a relay system, later described, automatically cuts off the flow of electricity and deenergizes the line in about 1/20 of a second. A conductor (a line carrying the electricity), is a little less than one inch in diameter. It is not a solid line. It has many strands making up the line and most of these are aluminum; however, it has an inner core of plow steel, a high tensible steel which substantially increases the strength of the line but is not itself a conductor. In other words, aluminum conducts the electricity and the steel provides an essential reinforcement. The weight of a conductor is 5526 pounds per mile or a little over one pound per foot. The ultimate strength of a conductor is 25,000 pounds. There are six conductors on each tower, three on each side. The top and bottom conductors are 10½ feet from the center line of the tower. The middle conductor is 13½ feet from the center line. Convincing evidence was introduced showing that the proposed conductors and towers meet the highest standards of construction used generally in the industry. Furthermore, throughout its entire length the line in its design equals and, in some respects, exceeds the requirements of Administrative Order #72 promulgated by the Public Utilities Commission of Ohio, which incorporates by reference the Safety Rules For the Installation and Maintenance of Electric

Supply And Communication Lines prepared and adopted by the National Bureau of Standards of the Department of Commerce of the United States.

Relator's private right of way, on which the towers will stand, is 90 feet wide. The line will be located over the center line of the right of way. There is, therefore, a clearance of 45 feet on each side of the line.

At this point I wish to advise the Court that in order to avoid unnecessary repetition I have purposely omitted a number of important facts which pertain to special subjects. I shall, therefore, report additional findings of fact at appropriate intervals when they are pertinent to my findings of law.

Consideration must now be given to Relator's right to do business in the city of Euclid. Relator was incorporated under the laws of the State of Ohio in 1892. Its right to manufacture and distribute electric energy anywhere in the State of Ohio emanates from the statutes of the state. Those relating to electric light and power companies have undergone a number of changes due to the fact that, in some respects, they were tied in with statutes relating to telephone and telegraph companies. Some of the changes, however, have no bearing upon the instant case

The first enactment touching the powers of electric companies organized for the purpose of supplying electricity to consumers, public and private, was passed in 1886 (83 Ohio Laws 143), which, in 1906, was Section 3471-3 of the Revised Statutes.

> (3471-3) Sec. 1. Powers of electric and power companies. A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may

> construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

Except for the last sentence relating to insulation, which was repealed in 1929 (113 Ohio Laws 74), that section, with some grammatical changes made by the revisers, has become Section 4933.13 of the Revised Code. Perhaps it should be mentioned that prior to 1886 there was no statute conferring power on a municipality to grant an electric light and power company the right to erect poles. Also it should be noted that the power given in the statute is to erect overhead lines. The language used does not include the right to install conductors underground.

In the following year (1887) an act was passed (84 Ohio Laws 7), which, in 1906, was Section 3471a of the Revised Statutes. This act did not repeal the act of 1886, supra, in express terms, but it did expand the powers of electric light and power companies by conferring upon them the same powers, but subject to the same restrictions, as those prescribed for magnetic telegraph companies. While this act remained in force, the authority of electric light and power companies to occupy the streets of a municipality was derived from the State. *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky* (1916) 93 Ohio St. 428, 113 N. E. 402, aff'd 251 U. S. 173.

In 1896, (92 Ohio Laws 204) Section 3471a was amended. This amendment provided that in order to subject an electric light and power company to municipal control alone, no person or company shall place, construct, or maintain a line for distribution of electricity through any street, alley, etc., without the consent of the municipality. It is plain that its purpose was to invest the municipality with the power to make the grant. The provisions of the act of 1887 and the amendment of 1896 substantially have been carried into Sections 4933.13 and 4933.16 of the Revised Code. The history of these changes is fully set forth in *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky, supra.*

Counsel for Relator, in their brief, express the view that "the origin both of the power to do business in the city and the power to erect pole lines in the city are the direct grant of the Legislature. The difference is that whereas the grant of the right to do business within the city is unqualified, the grant of the right to use the streets is conditioned upon the obtaining the consent of the city, and the city's consent may be qualified only by reasonable regulations." This distinction is sound and has generally been recognized by the courts. *Bartlesville Electric Light and Power Co v. Bartlesville Interurban Ry. Co.*, (1910) 26 Okla. 453, 458, 109 Pac. 228; *West Texas Utilities Commission v. City of Baird*, (1956) Tex. Civ. App. , 286 S. W. 2d 185, 187. It is, perhaps, unnecessary to state that the word "street" in its usual and ordinary meaning denotes a public highway; it does not include a private way. *Loma Vista Investment Co. v. Roman Catholic Archbishop*, (1958) Cal. App. , 322 P. 2d 35 and cases cited therein.

Relator's franchise contract with the Village of Euclid became effective in 1906. On July 9th of that year the

council of the village enacted Ordinance No. 32, and shortly thereafter it was formally accepted by Relator. With full knowledge of all the circumstances, the village—and later the city—has permitted Relator to invest more than $7,200,000 in the location and construction of its lines, fixtures, and facilities for the transmission of electricity in and through the city, and for more than 52 years has acquiesced in their maintenance and operation. Ordinance No. 32 provides:

> An Ordinance granting to the Cleveland Electric Illuminating Company and its successors, the right to erect, construct, maintain and use the necessary poles, wires, conduits and such other fixtures and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys and ways of the Village of Euclid, for the purpose of furnishing to said Village, the general public and private persons, light, heat and power by electric currents.
>
> SECTION 1. Be it ordained by the Village Council of the Village of Euclid, State of Ohio, that the Cleveland Electric Illuminating Company and its successors, be, and they are hereby granted the right to erect, construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances overhead and underground, as may be deemed by it or them necessary or essential to enable it to transmit electricity through and along the streets, alleys and ways of the Village of Euclid for the purpose of furnishing to said Village the general public and private persons, light, heat and power by electric currents.
>
> SECTION 2. All wires used by the Cleveland Electric Illuminating Company shall be properly insulated, and shall comply with all state regulations and ordinances to be passed by this Village requiring

proper insulation and until such ordinances are passed, all of said wires shall comply as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said Village.

SECTION 3. The Cleveland Electric Illuminating Company or its successors shall, before any work is commenced, submit to the proper officers of the Village, plans, showing the work it proposes to do in the erection of poles, wires, appliances, or in the building of conduits, and receive a proper permit therefor each time before any new work shall be undertaken, and they shall be kept upon file in the office of the Village Clerk with a proper record, showing that a permit for their construction has been entered, and thereupon the Cleveland Electric Illuminating Company or its successors shall have the right to proceed with its or their work in accordance with the plans and specifications placed on file by it or them.

SECTION 4. No pole or mast shall be erected by the Cleveland Electric Illuminating Company or its successors without the consent of the property owner before whose premises the said pole or mask is proposed to be placed; and the location of any pole, pier or support shall be subject to the control and direction of the Council of the Village of Euclid and shall be changed by the Cleveland Electric Illuminating Company or its successors to such other location as may be directed, whenever in the opinion of the Council the best interest of the Village and the general public demand the removal of the same.

SECTION 5. The Cleveland Electric Illuminating Company shall protect and indemnify the Village of Euclid, upon any and all claims for damages which may in any wise arise from the exercise of the rights and privileges herein granted.

SECTION 6. The Cleveland Electric Illuminating Company shall within ten days from the passage of

this ordinance, file with the Village Clerk a written acceptance of the conditions of this ordinance and shall pay the cost of publication of this ordinance.

SECTION 7. This ordinance shall take effect and be in force from and after its passage and legal publication and the filing of the foregoing acceptance and the payment of costs of publication by the Cleveland Electric Illuminating Company.

It should, perhaps, be observed that the ordinance imposes no restriction or limitation upon the amount of voltage that may be transmitted by Relator's lines, be they overhead or underground.

It is established and well-settled law that the grant of a franchise, like the one under consideration, is a contract which neither party has a right to annul without the consent of the other. The Supreme Court of Ohio has so often declared that the grant of a franchise by any subdivision of the State to, and its acceptance by, a public utility company constitutes a contract that that proposition may be considered finally settled. *Board of County Commissioners v. Public Utilities Commission*, (1923) 107 Ohio St. 442, 140 N. E. 87; *City of Cincinnati v. Public Utilities Commission*, (1918) 98 Ohio St. 320, 121 N. E. 688; *Interurban Ry. & Term. Co. v. Public Utilities Commission*, (1918) 98 Ohio St. 287, 120 N. E. 831. The same proposition has often been declared by the Supreme Court of the United States and by the courts of practically every State in the Union. *Northern Ohio Traction Co. v. State of Ohio*, (1918) 245 U. S. 574; *City of Owensboro v. Cumberland Tel. & Tel. Co.*, (1913) 230 U. S. 58; *Grand Trunk Western Ry. v. City of South Bend*, (1912) 227 U. S. 544; *City of Lansing v. Michigan Power Co.*, (1914) 183 Mich. 409, 150 N. W. 250. It is manifest that a change of village government into a city government, as in the case here

does not alter the rights of either party to the franchise contract. *City of Jamestown v. Pennsylvania Gas Co.*, (1924) 1 F. 2d 871; *People, ex rel. Woodhaven Gas Co. v. Deehan*, (1897) 153 N. Y. 528, 47 N. E. 787.

It will be noticed that the franchise contract embodied in Ordinance No. 32 is unlimited as to time. Respondents contend that the ordinance grants a revocable license only which may be terminated at the pleasure of the grantor. While there have been a few decisions to this effect, it is established by the overwhelming weight of authority that, there being nothing in the Constitution or statutes of the state limiting the period of such grants, a public utility franchise, silent as to the term of its duration, is not a mere license revocable at the will of the municipality, but a contractual and proprietary right in perpetuity immune from any interference or impairment. *Ohio Public Service Co. v. Ohio, ex rel. Fritz*, (1927) 274 U. S. 12; *City of Covington v. South Covington & Cincinnati Street Ry.*, (1918) 246 U. S. 413; *Northern Ohio Traction & L. Co. v. State of Ohio, ex rel. Pontius*, (1918) 245 U. S. 574; *Russell v. Sebastian*, (1914) 233 U. S. 195; *Boise Water Co. v. Boise City*, (1913) 230 U. S. 84; *City of Owensboro v. Cumberland Tel. & Tel. Co.*, (1913) 230 U. S. 58; *City of Bessemer v. Birmingham Electric Co.*, (1946) 248 Ala. 345, 27 So. 2d 565; *State, ex rel. Shaver v. Iowa Telephone Co.*, (1916) 175 Iowa 607, 154 N. W. 678; *City of Benton Harbor v. Michigan Fuel & L. Co.*, (1930) 250 Mich. 614, 231 N. W. 52, 71 A. L. R. 114. This doctrine is based upon the theory that it is against common experience to conclude that rational and intelligent men would be willing to incur the heavy expense of installing the costly fixtures and facilities necessary to the operations of the utility if they were removable at the pleasure of the municipality. *City of Louisville v. Cumberland Telephone Co.*, (1912) 224

U. S. 649; *City of Jamestown v. Pennsylvania Gas Co.*, (1924) 1 F. 2d 871.

There have been several cases in which the Supreme Court of Ohio appears to have held that a franchise which is indeterminate as to its duration, exists only so long as the parties mutually agree thereto. *Ohio Public Service Co. v. State, ex rel. Fritz*, (1925) 113 Ohio St. 325, 149 N. E. 129, rev'd 274 U. S. 12; *Village of Newcomerstown v. Consolidated Gas Co.*, (1919) 100 Ohio St. 494, 127 N. E. 414. These stem from its decision in *East Ohio Gas Co. v. City of Akron*, (1909) 81 Ohio St. 33, 90 N. E. 40. However, the Supreme Court of the United States has held that the rule first announced in the *East Ohio Gas Co.* case, *supra*, could not as a constitutional matter be applied to franchises granted prior to 1909 when that case was decided. See *Northern Ohio Traction Co. v. State of Ohio ex rel. Pontius*, (1918) 245 U. S. 574. In reversing the judgment rendered in *Ohio Public Service Co. v. Ohio ex rel. Fritz, supra*, the Supreme Court of the United States, in the same case (274 U. S. 12) said (p. 14):

> "In *Northern Ohio Traction Co. v. Ohio*, 245 U. S. 574, we pointed out the state of the law in Ohio during 1892. It is plain enough from what was there said that in our view the franchise originally granted by the Village of Orville was for an unlimited time and not subject to termination at the mere will of the grantor."

Manifestly the rights of Relator involved in the instant case are plainly within the protection of the Constitution of the United States; therefore, the decisions of the federal courts rather than those of state courts would seem to be controlling. *City of Benton Harbor v. Michigan Fuel & L. Co.*, (1930) 250 Mich. 614, 621, 231 N. W. 52, 71 A. L. R. 114.

I hold, therefore, as a matter of fact and of law, that Ordinance No. 32 grants Relator a franchise contract in perpetuity; that, within the city of Euclid, it has the absolute and unqualified right to erect and maintain its poles, towers, and lines on private lands and ways with the permission of their owners, that Relator's right to use the streets of the city for its corporate purposes is conditioned upon the obtaining the consent of the city, and that the city's consent may be qualified only by reasonable regulations prescribed by the city of Euclid in the lawful exercise of its police power. Before reporting my findings of fact and of law upon the issues which I regard as paramount above all others, perhaps it is fitting and proper here that I consider some matters which I deem less important. During the trial of the case and in their brief, Respondents have made various claims and have advanced several theories which concern the construction and application of certain conditions and requirements set forth in Ordinance No. 32; they also claim that because Relator, in their opinion, has failed to comply with some of these conditions and requirements, it has forfeited whatever right it might have had to the issuance of the permit for which application was made. Relator strenuously disputes these claims. I shall consider them separately.

In their brief, Respondents make the novel claim that Relator's right to manufacture and distribute electricity is restricted and limited by its Articles Of Incorporation and by the laws of Ohio to the city of Cleveland only, and that it has no lawful right to do business elsewhere. Inasmuch as the city of Euclid itself has willingly accepted and paid for electricity distributed by Relator for more than 52 years, it would seem incredibly late for it to claim now, and for the first time, that Relator has no legal right to distribute electricity outside the geographic limits of the

city of Cleveland and, in particular, in the city of Euclid. Whether a case might be made for the application of the doctrine of estoppel barring Respondents from raising this issue in the instant case may be questionable, but this I need now decide. I prefer to base my decision on less disputable grounds.

To support their claim, Respondents rely, in part, not upon the broad *purpose clause* in Relator's articles of incorporation but upon the terse sentence which designates the legal residence and main office of Relator. It provides:

> "Said corporation is to be located at Cleveland, in Cuyahoga County, Ohio, and its principal business there transacted."

Respondents fail to consider, however, the comprehensive purpose clause which states, among other things, that the purpose of the corporation is to manufacture, use and sell electricity for power, heat and light; no geographic limitations whatsoever being mentioned therein. The domiciliary clause, just preceding the purpose clause, was inserted in Relator's articles pursuant to a mandate of the then existing Ohio Corporation Law which compelled a corporation to designate its legal residence. Generally speaking, a corporation organized and existing under and by virtue of the laws of Ohio may do business anywhere in the State. The Legislature undoubtedly felt, therefore, that a corporation should be compelled to select and designate in a public record the particular location where communications might be adressed to it, where its executive officers might be found, where it might be taxed, where the courts might lawfully acquire jurisdiction of it, and where other needful purposes might be accomplished. Surely this is the common sense view. In *Pelton v. Transportation Co.*, (1882) 37 Ohio St. 450, Judge McIlvaine said (p. 455):

"For many purposes, a corporation is regarded as having a residence—a certain and fixed domicil. In this state, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicil or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicil, is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate."

In *Sweeney, Recr. v. The Keystone Driller Co.*, (1930) 122 Ohio St. 16, 170 N. E. 436, Judge Mathias said (p. 19):

"The place where an Ohio corporation is to be located or its principal business transacted is required by Section 8625, General Code, to be set forth in its articles of incorporation, * * *. The evident purpose of this requirement is that there may be no uncertainty as to the place of residence of the corporation. The articles of incorporation are of record, and from that source its designated residence may be readily ascertained and known with definiteness and certainty. If such designation is not controlling, the place of residence in many instances would be in doubt, and in numerous cases, where a corporation is engaged in business in various localities in the state, it would be difficult to determine its place of residence or the place where its principal business is transacted otherwise than at the end of a lawsuit through the determination of a court."

Furthermore, it has been held that until changed by the articles, the place designated therein is conclusive as to the domicil of the corporation even though subsequent developments indicate that the corporation's principal business is transacted elsewhere. *State ex rel. Stanton v. Zangerle*, (1927) 117 Ohio St. 436, 159 N. E. 825. Re-

spondents cite no authority for the specific proposition that a corporation's designation of "the place where it is to be located" restricts and confines its corporate purposes and operations to that particular place.

Respondents also claim that former Section 3471-3 of the Revised Statutes, as it existed in 1906, gave a public utility the right to do business only in a particular city, town, or village and did not empower it to do business in any other cities, towns, or villages, either with or without their consent; that having designated Cleveland, Ohio, in its articles of incorporation as its domicil, Relator has no legal right to conduct its business elsewhere. Such construction, in my opinion, is not tenable. Section 3471-3 of the Revised Statutes (now Sections 4933.13 and 4933.16 of the Revised Code) cannot be construed as limiting the operations of an electric light and power company to a particular municipality. The article "a" which precedes the words "municipal corporation" is used in an *indicative* sense, not a restrictive one. In other words, the statute merely provides that if an electric company should decide to enter *any* municipality and erect its lines and facilities in the streets of *that* particular municipality, it must first obtain the consent of *that* particular municipality so to do. The statute means this and nothing more. It is significant, I believe, that the Law Director of the city of Euclid and the Council of the city did not assign the alleged illegal operations of Relator in the city of Euclid as a reason for refusing to grant the permit which is in issue here.

Respondent's claims are without merit and I find, therefore, as a matter of fact and of law, that the right of Relator to manufacture, use and sell electricity for power, heat, and light is not restricted and confined by statute or by its articles of incorporation to the city of Cleveland only, but that, with the consent of any municipality in the

State of Ohio, Relator may lawfully occupy its streets, alleys, public places, etc. with its electrical facilities.

Respondents also claim that Relator's franchise to use the streets of the city of Euclid was granted for the sole purpose of supplying electricity to consumers in that city only; that such franchise prohibits Relator's use of the streets for its lines if the lines, which distribute electricity to the city itself and to its inhabitants, also transmit electricity which ultimately will be used by consumers who reside beyond the corporate limits of the city of Euclid.

Such a narrow and strained construction of the language of Section 1 of Ordinance No. 32 is palpably unsound. The consumers designated therein are the city, the general public, and private persons. If, as Respondents now claim, the council of the village of Euclid had intended to restrict Relator's right to use the streets of the village for the limited purpose now urged, it would certainly have stated such purpose in simple and unequivocal language, e.g., "the said village and its inhabitants." It did not employ such words; instead, it plainly designated three distinct classifications, namely, the village, private persons, *and the general public*. It should be remembered, too, that when the council of the village, in 1906, authorized Relator to use its streets for the transmission of electricity, it knew full well that such electricity was generated outside the boundaries of the village, since Relator had no generating plant within the village; and it may reasonably be assumed that it also knew that electricity so generated would be transmitted over the same line through and beyond the boundaries of the village. It is inconceivable that the council expected Relator's lines would come to a dead end when they reached the furthermost boundaries of the village. Obviously, such a transmission line would be utterly impractical and uneco-

nomical—a mere segment disassociated and cut off from Relator's established and widespread system of distribution. One cannot isolate a transmission line and tag that line as being used solely for the transfer of electricity from one boundary of the city to another boundary; it is an integral, inseparable part of an entire system of distribution. The construction of such a single purpose line would necessarily involve a large investment which could only be offset by unbearably high rates for the electricity supplied to the limited number of customers. The electric utility industry is known as a decreasing-cost business, that is, the greater the use, the lower the unit cost, assuming a constant price level. The evidence shows that Relator has invested more than $7,200,000 in its poles, lines, fixtures and facilities, exclusive of land itself, located in the city of Euclid alone. It is against all common sense to believe that Relator would have paid out such enormous sums without the assurance that the same lines and equipment used for furnishing electricity to the city and its inhabitants and industries could also be used for transmitting electricity to consumers outside the city. That assurance, beyond any peradventure of a doubt, was given Relator by express terms of Ordinance No. 32. Moreover, the evidence shows that permits have been granted by the city of Euclid for a number of Relator's existing lines carrying 33,000 volts which serve also consumers outside the corporate limits of the city. Authority for this is also made plain by the action taken by the council of the city in 1956—this will be fully discussed later—when it passed Ordinance No. 288-1956 which forbids Relator to use the streets of the city for its facilities if such facilities may also be used to transmit electricity, *in excess of 33,000 volts*, to consumers outside the city.

Furthermore, what possible harm would result to the

village—or city—and its inhabitants by permitting the lines erected in the streets to carry electric energy beyond its borders? The same line that supplies consumers in the village—or city—would carry the same electricity to consumers outside. No additional servitude would be imposed upon the streets. *Padgett v. Arkansas Power & Light Co.*, (1956) 226 Ark. 409, 290 S. W. 2d 426. Chief Justice Marshall made this plain in his concurring opinion in *Smith v. The Central Power Co.*, (1921) 103 Ohio St. 681, 137 N. E. 159. The facts in that case bear striking resemblance to the case at bar. The Power Company was granted a franchise by the city of Bucyrus to supply electricity to the city and to its inhabitants. The company had no plant for the generation of electricity within the city, but such energy was created at other points and carried into and through the city of Bucyrus by means of wires capable of transmitting 66,000 volts of electric current. This voltage was more than was necessary for the city and its inhabitants, and the wires were intended as trunk lines for transmitting such energy to other cities, and it was also intended that the same wires would if occasion required transmit current from either direction from plants located east and west of the city of Bucyrus. It was held that such use of the streets was properly within the ambit of the company's franchise. In *Northern Westchester Lighting Co. v. Village of Ossining*, (1913) 154 App. Div. 789, 139 N. Y. S. 319, aff'd 219 N. Y. 635, 108 N. E. 1102, it was held that a village having granted a utility company the right to lay gas mains in public streets cannot prevent it from laying other mains to supply adjoining municipalities named in its charter. See also *Long Island Lighting Co. v. Village of South Floral Park*, (1956) 158 N. Y. S. 2d 878, 879. And where a municipality purchased an existing utility serving territory with-

in and without the corporate limits, it was held that the municipality must step into the shoes of the public utility and continue to furnish service not merely to inhabitants within the municipality, but to people outside the municipality formerly served by the utility. *Wisconsin Power & Light Co. v. Public Service Commission* (1939) 232 Wis. 43, 286 N. W. 588, 122 A. L. R. 1135.

I find, therefore, as a matter of fact and of law, that Ordinance No. 32 authorizes and empowers Relator to use the streets of the city of Euclid—subject, of course, to reasonable regulations—, for its corporate purposes without regard to the question whether the electricity supplied by it serves not only the city of Euclid and its inhabitants, but also other consumers in areas beyond the corporate limits of the city of Euclid. Perhaps I should add that in reaching this conclusion, I am not unmindful of the fact that respondents offered no evidence whatsoever showing that any officials of the city of Euclid, during the 52 years and more that Relator's lines have been transmitting electricity to, through, and beyond the city of Euclid, have ever before questioned Relator's right so to do.

In their brief, Respondents state:

> "Ordinance No. 32 does not specifically refer to any particular streets of the village. * * * The language of the ordinance does not refer to any streets, alleys and ways of the village other than those then existing. It contains no language purporting to refer to streets, alleys and ways which in the future might be acquired by the village or when it became a city. * * * Such ordinance does not purport to grant any rights as to streets not in existence at the time of its enactment."

The evidence shows that when, in 1906, such ordinance was enacted, the village of Euclid contained but five streets. It had but 600 inhabitants who were engaged in

agricultural pursuits, principally grape raising. Respondents contend that "even if Ordinance No. 32 is a franchise, it must be strictly construed." In support thereof they invoke the established and salutary rule that public grants are to be construed strictly in favor of the public and that "whatever is not unequivocably granted is withheld" from the license or franchise. However, they do not cite a single case, and my own research has failed to discover one, which holds that a franchise, like the one in issue here, is limited to the particular streets in existence at the time the franchise is granted. It must be recognized, I believe, that the rule of construction invoked by Respondents does not deny to a public utility's franchise a fair and reasonable construction, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. In the instant case, there is no ambiguity as to the scope of the grant. Relator was given the right to construct, maintain and use the necessary poles, wires, conduits, and such other fixtures and appliances, overhead and underground, as may be deemed by it necessary or essential to enable it to transmit electricity through and along the streets, alleys and ways of the village. It is manifest that the grant is general, not limited. Whatever right the village had to attach conditions to the granting of consent to occupy its streets is really of no concern in this case for the city has already exhausted its power to consent. It is true, of course, that before Relator begins any work in the streets it must submit appropriate plans thereof to the city of Euclid. But it does not follow necessarily that this requirement constitutes a retention of power by the city to consent to the use of the streets. Counsel for Relator properly point out that this would be in derogation of the grant in Ordinance No. 32 of the city's absolute and unqualified consent to Relator to use the streets, alleys and

ways of the city as Relator in its own judgment might deem necessary and essential to its business, but would also disregard the well-established distinction in the law between the legislative giving of consent to use the streets and the ministerial granting of building or construction permits by the administrative departments of the municipality involved. See 12 *McQuillin Municipal Corporations* (3d ed.) § 34.76, pages 250-252.

I am unable to approve Respondents' narrow interpretation of Section 1 of Ordinance No. 32 with respect to Relator's rights in the streets of the city of Euclid. Comfortably authoritative are the decisions which also disapprove it. In *People, ex rel. Woodhaven Gas Co. v. Deehan*, (1897) 153 N. Y. 528, 47 N. E. 787 (approved in *Illinois Central R. R. v. Chicago* (1899) 176 U. S. 646, 666) a grant of authority to lay conduits for conveying gas through the streets of the town, so as to render service to the town, was held to extend as a property right not only to the streets then existing, but also to those subsequently opened.

The court said (p. 533):

> "It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when

made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old."

In accord with this decision are: *Russell v. Sebastian*, (1913) 233 U. S. 195; *Traverse City v. Consumers Power Co.*, (1954) 340 Mich. 85, 64 N. W. 2d 894; *Smith v. Central Power Co.*, (1921) 103 Ohio St. 681, 137 N. E. 159. See also *Padgett v. Arkansas Power & Light Co.*, (1956) 226 Ark. 409, 290 S. W. 2d 426.

It is difficult to understand how counsel for Respondents can seriously contend that Relator's franchise rights are confined to the four or five streets in existence in 1906. If this were true, then it is plain that, for many, many years, the authorities of the municipality have themselves violated Ordinance No. 32 by issuing permits to Relator for the construction and maintenance of its lines and facilities in order that it might supply electricity to countless persons whose homes have been erected on new streets.

I find, therefore, as a matter of fact and of law, that Relator's franchise right to use and occupy, for its corporate purposes, the streets, alleys and ways of the city of Euclid is not restricted and confined to the streets existing in that city in the year 1906, but, upon compliance with reasonable regulations, may be exercised also in the streets, alleys and ways subsequently constructed, enlarged, or changed.

Respondents make the claim that, contrary to the requirements of Ordinance No. 32, Relator, at the time it presented its application for the permit involved here, failed to present to the proper officers of the city, "plans

showing the work it proposes to do"; that the application was, therefore, defective. Respondents, I believe, attach undue importance to this claim and have resorted to a highly technical construction of the language of Section 3 of Ordinance No. 32, a construction wholly unwarranted when one considers the real purpose of the "plans." In this connection, it should be observed that there is no ordinance requirement as to the specific form which the application shall take.

It is clear that Ordinance No. 32 relates only to Relator's use of the streets, alleys and ways of the city. Respondents appear to claim that the city of Euclid is entitled to receive complete detailed plans and specifications of the entire proposed line or, at least, of that portion of the line that is within the geographic limits of the city. Their claim in this respect is not at all clear. However, it must be remembered that no application was made by Relator for a permit to construct the entire line since no permit for such line is required by Ordinance No. 32. All of the proposed transmission line, within the city of Euclid, will be constructed upon private right of way adjacent to the main line of the Nickel Plate Railroad except in one place where the right of way departs from the main line and follows a siding of the railroad and then back along another siding when it again resumes the route along the main line of the railroad. All towers supporting the conductors of the line will be erected on private right of way; none upon a public street. Relator's application, therefore, is for a permit to cross, at high altitudes, six streets with its conductors. To this extent only does Ordinance No. 32 apply.

The evidence shows that the plans and information furnished by Relator to the authorities of the city plainly indicate the need for the proposed transmission line, the route of the line, the number and location of towers, the

number of conductors, and the location and elevation of such conductors above the level of the streets over which the permit to cross was requested.

It is not necessary to extend this report by relating in detail all of the evidence introduced on this subject. Aerial photographs of the route of the line, designs, maps, charts, plats, estimates, and other statistical data were furnished by Relator for inspection by officials and council of the city. Furthermore, the evidence shows that, on several occasions, conferences were held at which members of the council and representatives of Relator were present. H. V. Erickson, a member of the city council, testified that "there were many figures given to us and things of that sort at various meetings"; and that "there were charts of a great many things shown to us." When the representatives of Relator were asked why they did not construct an underground line, the attending members of the council were informed that such a line would cost from seven to ten times more than the cost of an overhead line. When engineers of the city called upon an engineer of Relator to explain the automatic relay system, he outlined it in detail and showed them the plans that applied to its installation. The evidence plainly shows that representatives of the city had ample opportunity to require Relator to explain and clarify its documentary evidence and its oral representations concerning the line which the officials of the city may have deemed obscure or indefinite. Respondents introduced no evidence showing that any inquiries made by the city's officials or councilmen were not satisfactorily answered. The minutes of the meeting of the Executive Committee of the council (March 11, 1957) bear out this statement. Every lawful purpose or interest of the city of Euclid was fully served by the material submitted by Relator to the city's representatives.

It seems to me that it is utterly unreasonable, if not absurd, to interpret the word "plans," as used in Ordinance No. 32, as meaning the ultimate detailed plans and specifications prepared by Relator's designing and engineering departments. Definitive and unchangeable plans and specifications for a line such as here proposed cannot be made. The evidence shows that the planning, designing, and engineering of the entire line covered a period of some three years. Obviously, changes in the route and design of such a line must frequently occur. New buildings along the line might be erected or old ones altered and extended Each might require a redesigning of the line to conform to the changed conditions. New and improved appliances might come upon the market during the drafting of the plans. Necessarily these would require changes in the plans. In the instant case, after submitting its proposed plans, Relator, at the request of certain members of the council, was obliged to redesign the line by crossing the Nickel Plate Railroad tracks in two places and going down the other side. That the plans submitted by Relator were deemed adequate by the council of city is shown by its Resolution #147-1957, adopted June 17, 1957, wherein it categorically set forth its reasons for refusing the permit requested by Relator. It recites, among other things, that Relator offered evidence "including amendments of the previous plans"; "as shown in the attached plans"; "plans and evidence for the overhead construction by towers * * *." It is significant, I believe, that in this Resolution the council did not assign as one of the reasons for refusing the permit, the failure of Relator to furnish appropriate plans or sufficient information regarding the route and construction of its proposed tower line. Indeed, from all that appears, the first claim ever made by Respondents

that the application was in any way deficient, was made after this law suit was filed.

I find, therefore, as a matter of fact and law, that the plans and information furnished by Relator to the proper authorities of the city in support of its application for the permit involved here, fully meet the requirements of Section 3 of Ordinance No. 32.

Counsel for Respondents claim that "the application for a permit was such that it could not be issued by anyone, because that ordinance (No. 32) does not purport to authorize anybody to issue any permit for any electric line on any streets unless the wires are insulated. The uncontradicted evidence in this case is that none of the wires are insulated."

Section 2 of Ordinance No. 32 provides:

> All wires used by the Cleveland Electric Illuminating Company shall be properly insulated, and shall comply with all state regulations and ordinances to be passed by this Village requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said Village.

No evidence was introduced showing that there is any ordinance in the city of Cleveland regarding insulation, or that general ordinances have been enacted by the council of the city of Euclid which bear upon this subject. Furthermore, there is no rule or statute of the State of Ohio with regard to insulation other than that contained in the National Electric Code, which is part of Administrative Order =72 promulgated by the Public Utilities Commission of the State of Ohio. Reference to this will be made later. Whatever duty might rest upon Relator to insulate,

in some manner or other, the conductors of its proposed tower transmission line must, therefore, be found in Section 2 of Ordinance No. 32.

It is significant that the council of the village of Euclid did not clearly indicate what is meant by the words "properly insulated." Certainly these words do not necessarily imply that the duty of insulation is absolute under any and all circumstances. Were this not so, the council would have omitted the word "properly." Nor do the words "properly insulated" imply that the wires must always be mechanically insulated. The word "properly" does not mean "mechanically"; instead, it plainly suggests that there may be other acceptable methods of insulation. It may reasonably be inferred, therefore, that the council placed upon Relator the responsibility of determining when and in what manner its conductors should be insulated. It is inconceivable that the council would require Relator to mechanically insulate its conductors where such insulation would serve no needful or useful purpose. The ordinance does not require the doing of a vain and futile act. The words "properly insulated" plainly indicate this construction.

The imposition of the duty as to places where it may reasonably be anticipated that persons may come in contact with the conductors naturally implies that there is no such duty of insulation at other places. Thus, it follows that Relator's obligation is alternative in its nature. Either the conductors must be insulated, or they must be so located as to be, comparatively speaking, harmless. Manifestly, distance is the best and most practical insulator, and is so recognized by the electric power industry. Conductors properly suspended on towers high above the ground need not be insulated as there is no probability that anyone will

come in contact with them. In the instant case, it is undisputed that Relator's conductors, high above the ground, will be suspended from steel towers erected on private right of way into which the public may not lawfully enter; and that where the conductors cross six streets of the city of Euclid, they will do so at elevations varying from 52 to 64 feet above the surface level of such streets. Under these circumstances mechanical insulation is not necessary. In *Pascoe v. Southern California Edison Co.*, (1951) 102 Cal. App. 2d 254, 227 P. 2d 555, a negligence case, the court said (p. 257):

> "The defendant here was under a duty to maintain its highly charged tension wires as they crossed the state highway at a height that would not endanger the normal use of the highway for travel or other proper purposes. The defendant was bound to anticipate such normal use and thus place its wires at a height that would be regarded as reasonably safe. Under the circumstances here narrated it was not obligated to insulate its wires if they were placed at a distance above the highway where the current in the wires would not interfere at all with the normal and proper uses of the highway of a character that reasonably could be anticipated. In each case this is a question of degree."

In *Fairbairn v. American River Electric Co.*, (1915) 170 Cal. 115, 148 Pac. 788, a negligence case, the court said (p. 117):

> "No evidence was offered to show that the power wires should or could have been insulated by a covering for that purpose. The only evidence on the subject of insulation was given in behalf of the defendant, to the effect that wires carrying over twenty thousand volts of electricity could not be successfully insulated by any known covering, that if the wire carried more than ten thousand volts it was preferable to use bare

wires and that such was the invariable custom of electrical power companies."

Unquestionably, an electric power company constructing and maintaining a transmission line along or over public highways is bound to know the danger which may naturally be caused by the use of high tension lines and is required to exercise a high degree of care in placing the conductors so as not to interfere with traffic and so as to avoid contact with an injury to any person or object which may reasonably be expected to pass under the conductors. *Fairbairn v. American River Electric Co., supra.* In the instant case, Relator will fulfill that obligation. The evidence is uncontradicted that Relator's proposed line will be constructed and maintained in accordance with the standards of the electric power industry and will fully meet the requirements of the National Electric Code which is incorporated in Administrative Order #72 promulgated by the Public Utilities Commission of the State of Ohio. Perhaps it should be mentioned here that C. R. Woodmansee, Building Commissioner of the city of Euclid, testified that the city has adopted the National Electric Code as its code with respect to electrical installations. In that code insulation is defined, in effect, as the isolation of the wires, or whatever it is to be insulated, by some dialectic substance, including air. In the case at bar, the evidence shows that the conductors of the proposed line will be insulated from each other and that the line is properly insulated within the definition laid down in the National Electric Code. In *Northern Indiana Public Service Co. v. Howard*, (1957) Ind. App. , 139 N. E. 2d 558, a negligence case, the court said (p. 561):

"The evidence is uncontradicted that appellant's wires were maintained in accordanee with and met the requirements of the National Electric Safety Code. It

is shown that under the Code, wires placed 15 feet above the ground are not required to have any mechanical insulation upon them."

It might be noted also that the authorities of the city of Euclid have themselves construed the ordinance as I have here construed it since, on numerous occasions, they have granted Relator permits to construct and maintain low-hanging uninsulated lines carrying 33,000 volts. It is common knowledge that lines carrying such voltage are just as lethal as a line carrying 132,000. See *Smith v. Central Power Co.*, (1921) 103 Ohio St. 681, 698-699, 137 N. E. 159. Obviously there is far more danger in the line of lower voltage since they are of low tensile strength, are suspended on wooden poles, and are more vulnerable to violent winds and vehicular accidents. These conditions do not, ordinarily, apply to a high tension transmission line. The conductors are of great tensile strength; they are suspended from indestructible steel towers at altitudes beyond the reach of persons. Moreover, a relay system renders the conductors harmless in the event some unforeseen cause should break or damage the line.

I find, therefore, as a matter of fact and of law, that Relator's proposed transmission line is "properly insulated" in the sense these words are used in Ordinance No. 32.

In their brief, Respondents claim that Ordinance No. 32 "further provides that as a condition to such permit, the Relator shall obtain the consents of the property owners, in front of whose properties the poles or towers are to be placed. There is no evidence that such consents have been obtained by the Relator."

The pertinent portion of Section 4 of Ordinance No. 32 provides:

> No pole or mast shall be erected by the Cleveland Electric Illuminating Company or its successors without the consent of the property owner before whose premises the said pole or mast is proposed to be placed
> * * *

I am unable to accept Respondents' interpretation of this clause. In the first place it refers to persons whose property abuts on a city street. In the case here the towers, when erected, will be erected on private right of way and not in front of the property of any residents abutting upon the streets of the city. In the second place, the obtaining the consents of property owners, if such were needed, is not a condition precedent to Relator's right to a permit. The ordinance plainly states that consents must be obtained before a pole or mast is erected; not before the granting of the permit. There is no evidence that Relator has commenced the construction of any tower of the proposed line within the city of Euclid. Respondents' claim is without merit, and I so hold.

Respondents also claim that Relator has failed to comply with Section 5 of Ordinance No. 32 which provides:

> The Cleveland Electric Illuminating Company shall protect and indemnify the Village of Euclid, upon any and all claims for damages which may in any wise arise from the exercise of the rights and privileges herein granted.

In their brief, Respondents urge that "under such ordinance Relator can have no right to a permit until such indemnification shall be furnished. There is no evidence of the giving of such indemnification in the record." I believe that Respondents misconceive the meaning and purpose of Section 5. That section exacts a promise that Relator will indemnify and hold harmless the village [city] of Euclid in the event that it suffers loss upon any claim

or claims for damages arising from Relator's exercise of the rights conferred by the ordinance. It is manifest that by accepting the ordinance, Relator has unequivocally made such promise and has thereby obligated itself "to protect and indemnify" the city. Section 5 requires no more than this. Obviously the obligation to indemnify the city against loss does not arise until the city actually suffers a loss. According to *Webster's New Collegiate Dictionary*, the word "indemnify" means "to make restitution or compensation to; reimburse; also to make good (a loss)." *Bouvier's Law Dictionary* is to the same effect.

Respondents offered no evidence showing that any claim, or claims, for damages has been made against the city, and, in particular, that it has suffered a loss as the result of Relator's operations in the city. Relator, therefore, is nowise in default upon its promise to indemnify the city of Euclid. In any event, it cannot be said, as Respondents urge, that indemnification is a condition precedent to the issuance of the permit. In my opinion Respondents' construction of Section 5 of Ordinance No. 32 is unsound and untenable, and I so hold.

After due consideration of the foregoing views of the parties concerning the construction and application of Ordinance No. 32, insofar as that ordinance alone is involved in this case, I find, as a matter of fact and of law, that Relator has fully complied with all of the requirements and conditions set forth therein, and is, therefore, entitled to the permit sought by it. However, Respondents make the further claim that subsequent ordinances enacted by the council of the city of Euclid deprive Relator of its right to construct and maintain its proposed high tension tower line notwithstanding it may have fully complied with the requirements and conditions imposed by Ordinance No. 32. Two of those later ordinances concern the construction

and maintenance of overhead transmission lines within the city of Euclid; the other is a zoning ordinance which, among other things, regulates the location, construction, and height of buildings and other structures. Respondents claim that these ordinances are valid because each is grounded upon the police power of the city. Relator insists that the ordinances relating to transmission lines cannot be sustained as lawful exercises of the police power and are, therefore, unconstitutional and utterly void; and that the zoning ordinance is not applicable to it. I shall give consideration to the respective claims of the parties touching the validity of these ordinances.

Because this Court has so many times considered and passed upon questions involving the police power of municipalities, it would be a work of supererogation to discuss at length the origin, nature and extent of such power. However, without unduly extending this report, I feel obligated to mention some of the principles of law and some of the authorities upon which I have relied in reaching my conclusions as to the validity of the aforesaid ordinances.

The police power is not susceptible of exact definition. Many attempts have been made to define it, but without marked success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself. In *Olds v. Koltz*, (1936) 131 Ohio St. 447, 3 N. E. 2d 371, the court said (p. 451):

> "Every business has some relation to the general welfare, because there is none which is operated to supply consumers generally that does not have some public aspect; but the regulation thereof is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character. The exercise of the police

power is inherent in government and essential to its existence and inevitably comes into conflict with the constitutional guarantees of the right of property and liberty of contract. In each case presented the court must draw the line of demarcation. Courts do not attempt to define police power with exactness, and inevitably the individual case must stand upon its own footing."

Broadly speaking, the police power is that power of government, inherent in sovereignty, to provide for the public health, safety, morals and general welfare. Aesthetic reasons alone, unrelated to the requirements of the public health, safety, or welfare, will not justify the exercise of the power. *Wondrak v. Kelley*, (1933) 129 Ohio St. 268, 195 N. E. 65; *City of Youngstown v. Kuhn Bros. Building Co.*, (1925) 112 Ohio St. 654, 148 N. E. 842; *Pritz v. Messer*, (1925) 112 Ohio St. 628, 149 N. E. 30; *Federal Electric Co. v. Zoning Board of Appeals*, (1947) 398 Ill. 142, 75 N. E. 2d 359; *Hitchman v. Township of Oakland*, (1951) 329 Mich. 331, 45 N. W. 2d 306; *Lord Appeal*, (1951) 368 Pa. 121, 81 A. 2d 533. While the police power is broad in scope and its legitimate objects are general and comprehensive, it is nevertheless fundamental that the police power is limited to the promulgation and enforcement of reasonable measures substantially related to a legitimate object for its exercise. If it is clear that the police regulations adopted by municipal councils are arbitrary or unreasonable and have no substantial relation to the public health, safety, morals or welfare, it becomes the duty of the court to declare such regulations to be invalid. *Wondrak v. Kelley, supra*. The police power is, therefore, not an infinite and illimitable power; it ends precisely at the point where the reason for its existence ends. *McQuillin, Municipal Corporations*, (3d ed. 1949)

§ 24.03 to 24.09, inclusive. Manifestly, the police power is limited by Section 10, Article I and by Section 1 of the 14th Amendment of the Constitution of the United States; also by the impairment clause in the constitution of a state. *Russell v. Sebastian*, (1914) 233 U. S. 195; *City of Cincinnati v. Public Utilities Commission*, (1918) 98 Ohio St. 320, 121 N. E. 688; *Kessler v. Smith*, (1957) 104 Ohio App. 211, 142 N. E. 2d 231, App. dismissed 167 Ohio St. 91; *City of Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250. A municipal ordinance adopted under state authority constitutes "state action" and is within the prohibition of the impairment clauses of the constitutions, federal and state. *Staub v. City of Bexley*, (1958) U. S. , 78 Sup. Ct. Rep. 277; *Grand Trunk Western Ry. v. City of South Bend*, (1912) 227 U. S. 544, 556; *Froelick v. City of Cleveland*, (1919) 99 Ohio St. 376, 124 N. E. 212.

Counsel for Respondents contend, and rightly too, that all contracts are subject to the police power of the state. The Supreme Court of the United States has consistently held that reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future. *Dillingham v. McLaughlin*, (1923) 264 U. S. 370, 374; *Union Dry Goods Co. v. Georgia Public Service Co.*, (1918) 248 U. S. 372, 375. The Supreme Court of Ohio has expressed the same view. *City of Akron v. Public Utilities Commission*, (1948) 149 Ohio St. 347, 355; *Board of County Commissioners v. Public Utilities Commission*, (1923) 107 Ohio St. 442, 450, 140 N. E. 87.

While it is true that in the first instance the legislative body, state or municipal, determines the necessity for exercise of the police power, its objects, the subjects on which it operates and the mode of regulation; yet, in the final analysis, the reasonableness of any use or purported use of

the police power and the propriety of the objects thereof are necessarily judicial questions, and, indeed, courts have within well-defined limitations a recognized power and control over the exercise of the police power. In other words, the police power must be exercised within its appropriate sphere and by appropriate methods; it can be exercised only to promote the public good, and it is always subject to judicial scrutiny. *Dobbins v. Los Angeles*, (1904) 195 U. S. 223, 236; *Lawton v. Steele*, (1894) 152 U. S. 133, 137; *Cleveland Telephone Co. v. City of Cleveland*, (1918) 98 Ohio St. 358, 363, 121 N. E. 701; *Houston & Texas Central R. R. v. City of Dallas*, (1905) 98 Tex. 396, 415, 84 S. W. 648. It is equally well-settled that the courts may determine the constitutionality of a law by its operative effect, though on its face it may be apparently valid. *Belden v. Union Central Life Ins. Co.*, (1944) 143 Ohio St. 329, 340, 55 N. E. 2d 629; *Voeller v. Neilston Warehouse Co.*, (1940) 136 Ohio St. 427, 434, 26 N. E. 2d 442; *Castle v. Mason*, (1915) 91 Ohio St. 296, 110 N. E. 463.

With these principles in mind I shall next consider whether the ordinances of the City of Euclid, the validity of which is challenged by Relator, conform to fundamental law designed to curb and check the unwarranted exercise of unreasonable and arbitrary power. In resolving this question, it is necessary that I ascertain whether those ordinances bear a real and substantial relation to the public health, safety, morals, or welfare. It should be observed, of course, (1) that the business of generating, selling and distributing electricity is a lawful business; (2) that Relator's right to carry on such business is a property right constitutionally protected against unwarranted and arbitrary interference by legislative bodies. See *Nashville, C. & St. Louis Ry. v. Walters*, (1935) 294 U. S. 405; *Russell*

v. Sebastian, (1914) 233 U. S. 195; *City of Owensboro v. Cumberland Telephone & Tel. Co.*, (1913) 230 U. S. 58; *City of Louisville v. Cumberland Telephone & Tel. Co* (1912) 224 U. S. 649; *State, ex rel. Shaver v. Iowa Telephone Co.* (1916) 175 Iowa 607, 154 N. W. 678.

Negotiations between the city of Euclid and Relator for the granting of the permit here in issue commenced sometime in January, 1956. While these were still in progress, the council of the city enacted Ordinance No. 288-1956. It become effective December 3, 1956. It will be noticed that this ordinance and Ordinance No. 78-1957 which amended it, were passed as emergency measures. Even so, an emergency does not confer legislative power which otherwise would not exist because of constitutional limitations. A court cannot justify legislation merely on the ground that it was enacted to meet an emergency. *State, ex rel. Outcalt v. Guckenberger*, (1938) 134 Ohio St. 457, 460, 17 N. E. 2d 743.

It is necessary to obtain a clear understanding of the issues involved that the pertinent sections of Ordinance No. 288-1956 be set forth.

SECTION 1: POLE LINES

No person, firm or corporation shall erect or construct or cause to be erected or constructed any pole for any guy line, wires, or electrical conductors of any description whatever upon or across any streets, avenues, alleys or public property within the City of Euclid without first having obtained a permit therefor.

SECTION 2: PERMITS

In the case of a telephone company, such permit shall be issued by the Administrative Director. In the case of an electric company, the Administrative Director is hereby authorized to issue such permit, where the voltage to be carried is solely for the use by a residen-

tial, institutional or governmental consumer within the City of Euclid, or solely for the normal requirements of an industrial or retail business, or service consumer within the City of Euclid and provided that such voltage at no time shall exceed 33 KV. In the case of an electric company where the proposed voltage to be carried does exceed 33 KV, the permit shall be authorized by the Council. The form of the permit shall be as approved by the Director of Law and no fee shall be charged for such permit. Such permit shall specifically be subject to the terms and conditions of all ordinances of the City of Euclid pertaining to any franchise rights of the public utility and to the provisions and reservations of Article IX of the Charter and of the City of Euclid. No permit shall be issued until the public utility shall first have filed appropriate plans in the office of the Administrative Director, which shall be permanently filed in his records.

It must be observed, however, that any rights of Relator growing out of the original franchise, Ordinance No. 32, enacted in 1906, are not affected by Ordinance No. 288-1956, but are expressly preserved and protected pursuant to Section 3 of Article XI of the Charter of the City of Euclid. Earlier in this report, it was determined that the State of Ohio has granted Relator the right to do business in the city of Euclid; that its right to use the streets of the city for its poles, lines and facilities is conditioned upon the obtaining the consent of the city; that the city has manifested its consent by granting Relator the right in perpetuity to use the streets of the city, subject to reasonable regulations, for Relator's corporate purposes. I have also determined that Ordinance No. 32 grants Relator the right to use the streets not only for the purpose of supplying electricity to the city of Euclid, its inhabitants, and any other consumers therein, but also for the purpose of supplying electricity to consumers located beyond the

geographic limits of the city of Euclid. All of these rights are contractual and vested rights and ought not, in all fairness, unilaterally be revoked, withdrawn in part, or otherwise abridged by legislative measures subsequently enacted by the city.

Briefly summarized, Section 2 of Ordinance 288-1956 provides that in the case of an electric company the Administrative Director of the city is authorized to issue the permit where the electric energy to be carried does not exceed 33,000 volts; that where it exceeds 33,000 volts, the permit shall be authorized by the council; that no permit shall be granted unless the voltage to be carried is solely for the use of consumers within the city of Euclid.

Relator challenges the validity of this ordinance upon the grounds that: (1) it is unconstitutional in that it constitutes an impairment of the rights and privileges specifically granted it by Ordinance No. 32; (2) it is unconstitutional in that it confers administrative powers upon the legislative authority of the city, and sets up no standards to control whether the permit should be issued or denied. On the other hand, Respondents urge that Ordinance No. 288-1956 must be held valid for two reasons: (1) that the reservation of power clause in Ordinance No. 32 expressly provides that "this grant shall be subject to all general ordinances now or hereafter in force in said village"; (2) that Ordinance No. 288-1956 is a proper exercise of the police power.

Ordinance No. 288-1956 expressly prohibits the issuance of a permit to Relator if its lines and facilities are to be used also for the transmission of electricity to consumers beyond the corporate limits of the city. Unquestionably this constitutes a revocation of a right previously granted Relator by Ordinance No. 32, and one long recognized by the authorities of the city. The evidence shows

that all of Relator's 33,000 volt lines, for which permits were issued by the city, provide service in part outside the city of Euclid. This is a valuable right and one that is essential to the efficient and economical operation of Relator's bulk power system. The plainest principles of justice would seem to demand that none of Relator's rights shall be cut down or lopped off, in the absence of some controlling principle of public policy. In *Grand Trunk Western Ry. v. City of South Bend*, (1912) 227 U. S. 544, it appears that the city, in 1868, passed an ordinance granting the company the right to construct its railroad through the streets of the city, no more than one track to be laid, except that the company had the right to lay a double track on Division Street. A single track was laid on that street in 1871. In 1881, the company built a portion of a double track on the street. When, in 1901, the company was preparing to complete the double track, the city repealed so much of the ordinance of 1868 as gave the right to a second track on Division Street. The city claimed that because of the great increase in its population, the two tracks would be a menace to human life. The company sought an injunction against the city. The Supreme Court of Indiana upheld the repealing ordinance on the ground that it was a proper exercise of the police power. Reversing that court, the Supreme Court of the United States held that the original ordinance was a valid contract binding and enforceable according to its terms; that the subsequent ordinance depriving the company of its right to build a double track was not a valid exercise of the police power, but an impairment of the contract and unconstitutional.

We are not dealing here with a general ordinance of a regulatory nature. We are dealing with a legislative act which utterly destroys a valuable right unconditionally

granted Relator by Ordinance No. 32—a right which it has enjoyed for more than 52 years. Unquestionably the city has reserved the right to enact ordinances which reasonably regulate Relator's use of the streets for its poles, lines, and facilities. Even without the reservation clause in Ordinance No. 32, the city would have the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incidental to the unabridgeable police power of the city. It should be remembered, however, that that clause does not reserve to the city any right to revoke or repeal Ordinance No. 32, or to cut down or lop off any of the rights therein granted. In *Detroit v. Detroit Citizens' Street Ry.*, (1902) 184 U. S. 368, the council of the city enacted certain ordinances which granted the company the right to use the streets and also fixed the rates of fare; but the city reserved "the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways." Subsequently the city enacted ordinances reducing the rates of fare specified in the original grants. It was held that such reservation gave the city the right to make rules and regulations as to matters incident to the location of tracks, placing of switches, frequency of car runs, speed of cars, etc., but it did not give the city the power to alter the rates of fare. Mr. Justice Peckham said (p. 398):

> "* * *, we are of the opinion that not one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances."

A reservation to alter or amend in a municipal ordinance, granting rights in the streets to a public utility

company, as the necessities of the city demand, is simply a reservation of police control and does not reserve a right to revoke or to repeal, in whole or in part, the ordinance itself. *Russell v. Sebastian*, (1912) 233 U. S. 195; *City of Owensboro v. Cumberland Telephone & Tel. Co.*, (1913) 230 U. S. 58; *Rockland Electric Co. v. Borough of Montvale*, (1928) 104 N. J. L. 480, 141 Atl. 673.

Relator does not urge it, but I believe a sound argument might be made for the proposition that Ordinance No. 288-1956 is not a "general ordinance" in the sense those words are used in the reservation clause of Ordinance No. 32. It seems to me that, notwithstanding its general language, Ordinance No. 288-1956 is aimed directly and solely at Relator. Viewed realistically, it is not intended to apply to any other person, firm, or corporation. I believe it may be fairly assumed, and the evidence tends to show, that when the council of the city of Euclid learned that Relator was planning to construct a high voltage tower transmission line in the city of Euclid, it promptly undertook to ban the same by enacting an ordinance which, in effect, would render such a line practically useless for the purpose it was intended to accomplish. No other "emergency" was shown to exist. If this is the real purpose of Ordinance No. 288-1956, it would seem difficult to regard it as a "general ordinance."

But be this as it may be, I find, as a matter of fact and of law, that Ordinance No. 288-1956 annuls and destroys an essential and valuable vested right of Relator and that its validity cannot, as Respondents urge, be upheld on the ground that it is a lawful general ordinance enacted pursuant to the reservation clause of Ordinance No. 32.

Can it be upheld as constituting a reasonable regulation enacted in the lawful exercise of the police power?

I think not. Ordinance No. 288-1956, insofar as it deprives Relator of the vested right to use the streets of the city of Euclid for the transmission of electric energy to consumers located outside the city, bears no real and substantial relation to the public health, safety, morals, or welfare. As a matter of common sense, it is inconceivable that any person's health, safety, morals or welfare could possibly be promoted by depriving Relator of its right to use its lines and facilities also for the transmission of electricity beyond the . The same current that directly and indirectly serves the city of Euclid, its inhabitants and industries, merely passes on to consumers beyond the city. No additional servitude is imposed upon the community, and certainly no person's health, safety or welfare is put in jeopardy by reason of the fact that others outside the city will enjoy the same benefits from the same transmission lines which, as part of Relator's integrated bulk power system, directly and indirectly furnish an adequate flow of electric energy to consumers within the city of Euclid.

Since the restriction thus imposed by Ordinance No. 288-1956 upon Relator's lawful business is arbitrary, unreasonable, and oppressive, and since the ordinance neither promotes, nor even tends to promote, the public good, its validity cannot be sustained on the ground that it is a lawful exercise of the police power of the city. In *City of Cincinnati v. Correll*, (1943) 141 Ohio St. 535, 49 N. E. 2d 412, Judge Bell said (p. 539):

> "The courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.
>
> If an enactment is referable to the police power to be valid, the court must be able to say that it tends

in some substantial degree to the prevention of offenses, or the preservation of the health, morals, safety or general welfare of the public. Therefore, if it is apparent that there is no plausible, reasonable and substantial connection between the provisions of the act and the supposed evils to be suppressed, there exists no authority for its enactment. Legislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious, or unreasonable restrictions upon lawful business."

I find, therefore, as a matter of fact and of law, that Ordinance No. 288-1956 unduly restricts Relator in the exercise of the rights and privileges acquired by it under and by virtue of Ordinance No. 32; that it is an unreasonable, arbitrary and capricious attempt to exercise the police power of the city of Euclid; that it violates Section 10 of Article I and Section I of the Fourteenth Amendment of the Constitution of the United States, and Section 28 of Article II of the Constitution of Ohio; and that it is inoperative and void. By reason of this finding, I do not feel that it is necessary to pass upon Relator's claim—and it appears to be a meritorious one—that Ordinance 288-1956 also is unconstitutional for the reason that it confers administrative powers upon the legislative authority and sets up no standards to control whether the permit should be issued or denied.

Less than four months after the passage of Ordinance No. 288-1956, the council of the city of Euclid amended and supplemented it by adding a new section (Ordinance 78-1957) which became effective March 3, 1957. The pertinent part thereof follows:

"SECTION 2.1: PERMIT ISSUED BY COUNCIL.

It shall be unlawful to construct or maintain an electric power line carrying greater voltage than

33KV, without first obtaining a permit therefor from the Council. No charge shall be made for such permit. The applicant shall first file plans and specifications, which shall show the course and route of such proposed line in or through the City of Euclid. Such line shall be installed underground, at a minimum depth of six feet below grade. It shall be backfilled by and laid in at least six inches of sand. It shall be standard underground pipe-type cable, lead covered, to be no less than the standard minimum A. E. I. C. specification as to voltage, herein adopted. Such line shall be encased in an enclosed sealed and welded steel pipe with protective sheath, having a somatic coating. Such pipe may either be oil or gas filled and shall be capable of withstanding any maintained pressure."

It will be observed that this section requires that *all* transmission lines carrying more than 33,000 volts *shall be installed underground*. Relator has challenged the validity of this ordinance. Respondents contend that the ordinance is valid for the reasons that (1) high tension lines constitute a nuisance; (2) that Ordinance No. 78-1957 is enacted pursuant to the reservation clause in Ordinance No. 32 and is a lawful exercise of the police power of the city and therefore not violative of Relator's constitutional rights. On the other hand, Relator claims (1) that it has the unqualified right to construct an overhead transmission line; (2) that there is no reliable evidence that the proposed line will unreasonably expose the public to danger; (3) that Ordinance No. 78-1957 constitutes an unwarranted and unconstitutional abrogation of Relator's contractual rights by attempting to retract the consent given by the city in the original franchise (Ordinance No. 32); (4) that even if the question whether transmission lines shall be constructed overhead or underground were a subject concerning which the city of Euclid might in a

proper case exercise its police power, the absolute prohibition of overhead transmission by Ordinance No. 78-1957 is unreasonable, arbitrary, and oppressive because, under the facts and circumstances of this case, it bears no real and substantial relation to the public health, safety, morals, or welfare; (5) that there is no compelling necessity for the construction of an underground line and that its cost would be excessive, wasteful, and prohibitive, and not correlative to any benefits resulting to the general public.

At the threshold of my discussion of the respective claims of the parties, I believe it will be helpful to first describe the route of Relator's proposed overhead line, the character of the area through which it passes, and the uses to which adjoining lands are put. Throughout the entire length of the line, its route is along the Nickel Plate Railroad on private right of way, the width of which is 90 feet. The evidence plainly shows that this route has many constructional and operational advantages. The line passes through an area set apart by the city's zoning ordinance, and used for industrial purposes only. Some of the areas adjoining the right of way are somewhat rural and sparsely occupied; some of it is vacant and unimproved; and other parts appear hardly suitable for any purpose. The line will not directly pass through any residential areas, and where it approaches a recreational area, it crosses the railroad tracks and goes down the other side. Except for several pieces of property, perhaps 1000 feet or more from the southerly boundary of the railroad's right of way—there is no evidence showing the exact distance—no homes are even near the route of the proposed line, since, at this point, the line will be located on Relator's right of way north of the railroad tracks. For the most part, the proposed line parallels Relator's existing

33,000 volt lines on the opposite side of the railroad tracks. No trees stand upon or are close to Relator's right of way. Photographs offered in evidence by Relator and by Respondents, and my own observations made while inspecting the areas involved, convince me that the route selected by Relator is, in every respect, an ideal one for the location of its proposed line through the city of Euclid.

It will be remembered that the original franchise (Ordinance No. 32) expressly grants Relator the right to erect and use the necessary poles, wires and such other fixtures overhead and underground *as may be deemed by it* necessary or essential to transmit electricity through and along the streets and ways of the city. It is clear that the grant of the power to erect overhead lines and the grant of the power to construct underground lines are separate and distinct grants. Relator is unequivocally given the right to choose which method of transmission it will employ or whether it will employ both methods. It would seem, therefore, that having granted Relator the right to construct an overhead line if in its judgment such line is necessary or essential to fulfill its obligations to its customers, the city ought not to be permitted, by subsequent legislation, to withdraw or revoke the right so granted. I can see no reason why the city can say to Relator: We shall take back one part of the original grant, but we shall allow you to enjoy the other part. As before indicated, such legislation constitutes an impairment and abridgement of Relator's constitutional rights.

Respondents strenuously contend, however, that Ordinance No. 78-1957 may still be regarded as a proper exercise of police power. Unquestionably, a municipality is given the wholesome right to regulate its internal and domestic affairs within the limits essential to the welfare of its citizens. A municipality has the right to enact reason-

able ordinances, and to enforce them; but it is the conservator, not the autocrat of the police power. It may originate the exercise of its useful authority, and apply it by specific and valid regulations; but that exercise is not despotic, nor absolute, and, when challenged, is subject to judicial examination. *Northwestern Telephone Exchange Co. v. City of Minneapolis*, (1900) 81 Minn. 140, 83 N. W. 527, 86 N. W. 69.

Consideration will now be given to the evidence introduced by Respondents in support of their claim that Ordinance No. 78-1957 is a proper and lawful exercise of the police power of the city of Euclid, and to the evidence introduced by Relator in opposition to such claim.

On behalf of the city, a Sergeant of the Police Department, a Lieutenant of the Fire Department, and the Assistant Chief of the Fire Department testified to a number of instances where live wires had been blown down by high winds or knocked down by falling trees. In one case, a small fire was started on the roof of a garage; in another a broken wire fell across a parked automobile; and, in another instance, a workman was killed when he came in contact with a fallen wire which he had plainly been warned not to touch. It should be observed, however, that in every instance to which Respondents' witnesses testified, the particular wires affected were low-hanging distribution wires strung on wooden poles along the streets or at the rear of privately owned lots. Not one of those incidents involved a steel tower transmission line of high tensile strength which is the only type of line in issue in the instant case. Obviously, lines supported by wooden poles are especially vulnerable. The poles may be blown down by high winds, or knocked down by automobile or motor trucks using the streets. Moreover, a wire carrying 33,000 volts or less is of far less tensile strength than that

of a conductor of a 132,000 volt line. As proof of this, Relator introduced evidence showing that, in 1953, the Cleveland area was subjected to a tornado, yet it caused no damage to any of Relator's 132,000 volt steel tower lines. Furth rmore, Relator's evidence shows that there are 428 roads and streets which are crossed by 877 single circuit conductors of its existing 132,000 volt lines—502 of which are within the confines of municipalities—, and that its thirty years of record keeping disclose no instances of such lines being down on any roads or streets. It should, perhaps, be mentioned that in comparison with the aforesaid 877 crossings, there will be only 12 such crossings for Relator's proposed tower line in the city of Euclid, of which two circuit crossings are over a "paper" street which is not yet constructed. There is, of course, no danger of trees falling across the proposed line since there are none standing on the right of way along which the line will pass.

Relator's evidence did disclose, however, that in its thirty years of record keeping there were nine instances of accidents affecting its 614.19 circuit miles of 132,000 volt lines. Some of these were most unusual. For example, in 1928 a careless aviator flew into a line and brought down two conductors. In 1929, an oil pipeline near a tower sprang a leak. The oil was ignited by sparks from a passing locomotive and the heat from the oil fire dropped one of the conductors. In 1933, a conductor was brought down by a rifle bullet. In 1955, there were two cases where the lines had been dynamited by vandals. In two instances, not in the Cleveland area, a line came down due to an unusually heavy formation of ice. The evidence discloses, however, that at those times the ultimate strength of the conductors which came down was only 9000 pounds; that the ultimate strength of the conductors of the proposed line is 25,000 pounds. Furthermore, there is evidence to the ef-

fect that the Cleveland area is not normally subjected to heavy icing conditions. In none of these instances, except in the case of the aviator, was anyone injured and no person's property, other than Relator's was damaged. Brief mention should, perhaps, be made of another situation or condition concerning which Respondents introduced evidence. An officer of the police department testified that when low-hanging poles fell in the streets, serious traffic jams resulted; that traffic is either stopped entirely or diverted into one lane until the wire is removed by employees of Relator who are promptly summoned by officers on the scene. Obviously, this is an annoying affair to all concerned, but delays and tie-ups of vehicular traffic are common occurrences in every municipality and may result from any one of a number of causes; such as slow moving trains at ground level crossings, automobile collisions, excavations in streets, and the occupation of a street by fire-fighting equipment. But be this as it may be, the occurrence is hardly one which endangers the public health, safety, morals, or welfare.

Before concluding this discussion of the possible hazards caused by fallen wires, consideration must be given to the evidence introduced by Relator concerning its automatic relay device which is an integral part of its proposed high voltage tower line. This device is not used on the lower voltage lines to which Respondents' witnesses testified. Protective relaying is the engineering science of providing for the removal of abnormal conditions from an electric system in order that it may not hinder its operation. The relay system operates by having a sensing device at the terminals of each circuit which is protected. This device will determine whether abnormal or faulted conditions exist on that circuit. In the event such conditions do exist, the sensing device or relay recognizes this

condition and proceeds instantly to operate to open the circuit breaker or switch through which the line is energized. This automatically de-energizes the faulted section of the line. The sensing device will operate within approximately 1/20th of a second from the occurrence of any fault on the line. There is, therefore, no likelihood that persons will suffer any injuries or that property will suffer any damage should a conductor, due to some unforeseeable cause, fall or be cast down. Before it could strike the ground from a 50 feet to 60 feet elevation, it would be rendered harmless. The conductor would be disconnected and de-energized even before it could strike any of the five existing structures over which the line passes, since it is at least 26 feet above any such structure, and rate of acceleration of an object in free fall is 32 feet per second. There is expert testimony showing that the design and construction of the relay device is of the highest caliber and that it is the fastest, most sensitive, and most complete protection in use. The evidence also shows that the circuit breakers, switches, and relays are inspected and tested at regular intervals to see that they are in proper operating condition. Respondents offered no credible evidence tending to contradict Relator's evidence concerning the objectives and efficacy of the protective relay system.

In a further effort to sustain the validity of Ordinance No. 78-1957 as a valid exercise of the police power, Respondents introduced evidence the purpose of which is to show that Relator's proposed 132,000 volt tower line would interfere with the efforts of firemen when fighting fires, and might even cause injury or death to some of them. The Assistant Fire Chief's testimony on this subject is largely speculative and not at all convincing. It will be remembered that, for the most part, the route of the proposed line is along the tracks of the Nickel Plate Railroad

Due to the location and topography of Relator's right of way, it would be highly impractical, if not impossible, to propel and operate fire trucks thereon. The only possible places where firemen might be hampered in their work would be where a fire occurs in a building located on, or close to, one of the six streets over which Relator's tower line will pass, or where, in a few instances, the line crosses over a portion of a building with clearances varying from 26 to 41 feet. With respect to the latter, however, there is little, if any, likelihood of firemen coming in contact with a conductor of the line, because its elevation is so high above the ground and the structure itself that it is doubtful whether firemen on ladders or other fire-fighting equipment could even reach it.

It seems to me that all of the testimony bearing on the subject of hazards to firemen is highly speculative since, so far as the evidence shows, no officer or fireman in the city of Euclid has ever had any actual experience with tower transmission lines of the type in issue here. The only testimony produced by Respondents relates solely to the many low-hanging distribution lines which are strung along the streets or at the rear of privately owned lands. Not a single witness was produced who could testify from his own experience to facts tending to show that high voltage tower lines hamper firemen in their work or necessarily subject them to the risk of injury or death. The only evidence on this subject is opinion evidence which is based solely upon hypothetical situations and circumstances. Relator's 132,000 volt lines cross 428 roads and streets and pass through some 90 municipalities, of which the city of Cleveland is one. Photographs in evidence show that 132,000 volt tower lines are constructed and maintained along certain streets in the city of Cleveland in residential, commercial, and industrial districts. It seems to me that

if, as Respondents claim, lines such as these ever hindered firemen in their work or caused injuries or death to firemen in the city of Cleveland or in any of the many municipalities in Ohio through which high voltage tower lines pass, it would have been easy for counsel for Respondents to have called as witnesses, or to have taken the depositions of, firemen who could testify to actual facts concerning their own personal experiences with such lines. It is significant that no such evidence was produced; instead the only evidence introduced by Respondents are the opinions of one local fireman. These are conjectural only and have little or no probative value. All of the facts of which the witness has personal knowledge concern low-hanging poles lines. Manifestly, these might prove troublesome, and surely the risk of electrocution is far greater with respect to such lines than it is with a much higher steel tower line. Assistant Chief Langa admitted this and also stated that the lethal character of a 4600 volt line is just as dangerous as a line carrying 132,000 volts.

I have carefully reviewed all of the evidence on this subject and am persuaded that, under the circumstances of this case, Relator's proposed tower line will hamper firemen hardly at all, and will not subject them to hazards beyond the measure of those they normally face in the performance of their duties. The route of the proposed line will be known to all firemen; in any event, it will be plainly visible to anyone willing to look. Reasonably intelligent firemen should have little or no trouble in maneuvering and placing their ladders, hoses, fire trucks and other equipment in such strategic places as will enable them to successfully perform their duties and still be sufficiently distant from the tower line to avoid all possibility of contact.

As additional proof of possible hazards resulting from the construction and operation of Relator's overhead line, Respondents introduced evidence showing the existence of two horizontal tanks and five tall cylindrical tanks which are constructed upon land owned by the General Electric Company, and tending to show that those tanks are somewhere in the vicinity of Relator's proposed tower line. The horizontal tanks are 67 feet long and 8½ feet wide. They are made of steel. Each contains liquid propane gas under pressure and have a capacity of 30,000 gallons. There is no evidence as to the size of the cylindrical tanks, but there is hearsay evidence to the effect that they contain from 200,000 to 300,000 cubic feet of fuel gas or hydrogen gas. The Assistant Chief of the Fire Department and the Building Inspector of the city of Euclid testified as to the character of the gases and expressed their opinions that all of them are dangerously inflammable and explosive. The witnesses also stated that if any substantial quantity of gas should escape from the tanks, and if a favorable wind would carry them over the proposed overhead line, and if at that very moment there were a spark or some source of ignition at the point where the gas crossed the line, there might be a burst of flame or a violent explosion. It was admitted, of course, that the mere presence of an energized line would not of itself ignite the gases. A major, but missing, factor in this fantastic concatenation of iffy circumstances is the element of distance between the tanks and Relator's proposed tower line. There is no reliable evidence touching this essential factor. This is an important factor since it is a well-known fact that escaping gas, when released into the atmosphere of the great outdoors, will quickly be dispersed, dissipated, and rendered harmless. Neither witness seems to have considered this scientific fact. I am convinced that Respondents' theory of this al-

leged hazard is more fanciful than real. Other evidence supports my view. The land of the General Electric Company lies between the main line tracks of the New York Central Railroad and those of the Nickel Plate Railroad. The evidence shows that the gas tanks of the General Electric Company have been there for some 20 to 25 years. During that time coal burning locomotives have passed close to this land countless times and, unquestionably, have countless times emitted sparks from their stacks. Undoubtedly winds have, in many instances, carried those sparks over the land of the General Electric Company, yet there is no evidence showing that any fire or explosion has ever occurred in all that time.

There is evidence also that acetylene gas is manufactured and stored by the National Cylinder Gas Company in its plant which is located on a switch track of the Nickel Plate Railroad in the vicinity of the route of Relator's proposed line. This gas, too, is said to be inflammable and explosive. Much that I have said about the alleged hazards resulting from escaping gases on the land of the General Electric Company is equally applicable to the situation at the plant of the National Cylinder Company. There is another factor, however, which should be mentioned. Besides the sparks resulting from the operation of locomotives on the switch track alongside of the shipping platform of the National Cylinder Gas Company, there is an additional source of ignition. About 50 feet from that plant there is an electric traveling crane on property owned by the Austin Company. The crane itself rides between two fixed bridges and its motor receives its power from an exposed electrical conductor by means of a steel shoe which slides along the conductor. This mechanism is, of course, a constant source of arcing, yet there is no evidence that sparks, or other sources of ignition caused by

its operation, have ever ignited any of the acetylene gas manufactured and stored by the company during an estimated period of 12 years that the plant and crane have been in operation. Perhaps the most impressive evidence showing the fallacy of Respondents' claim comes from the lips of the city's Assistant Fire Chief and its Building Inspector. The former testified that vents in the propane gas tanks automatically release gas into the air when the pressure exceeds certain limits; the latter testified that the National Cylinder Gas Company intentionally releases acetylene gas into the air whenever its employees produce a "bad batch." If these officers really believe that the various gases when released might become dangerous to life and property, it is unthinkable that they would placidly countenance such perilous practices. The conduct of these public officers utterly repels their claims that the danger of fire and explosion is great, else they bear an awful responsibility for their failure to put an end to the intentional release of such gases by those who manufacture or store them.

The evidence before me is overwhelmingly in favor of the proposition that the overhead transmission line in issue here will be installed with all reasonable care for its safety in construction and operation; and that it will more than meet the margin of safety factors established by the recognized standard setting authorities in the field. It is common knowledge that electricity is normally recognized as a necessity of life and that tower lines which carry it are a part of the mechanized age in which we live. Human carelessness, in the main, and mechanical defects, to some extent, are responsible for accidents which take their toll in human life and loss of property as witness the rate of fatalities, injuries, and property losses arising out of the use of automotive vehicles. But apparently our society is

willing to pay this toll for the luxury of living it enjoys. Nothing in this case points to the exposure of the public to any hazard greater than the ordinary calculated risks which have become part of the normal conditions of life in our highly mechanized age. In my judgment, Respondents' apprehensions concerning the safety of the proposed overhead line are not supported by any credible and convincing proofs. I am persuaded and therefore find that, so far as human prediction will permit, the construction and operation of Relator's proposed overhead line will not, in any appreciable degree, endanger the lives or property of the inhabitants of the city of Euclid or of the public in general.

Respondents also contend that Relator's proposed line will be an intolerable source of annoyance to radio and television users in the city of Euclid. They also urge that there will be a great loss in real estate values which will be reflected in a reduction of the tax duplicate and a loss of tax revenue. It is difficult to see how the police power may lawfully be exercised to prevent the happening of these alleged evils since, strictly speaking, neither one bears any real or substantial relation to the public health, safety, morals, or welfare. Considerable testimony was given by two experts in the field of electronics, called as witnesses by Respondents, to the effect that an electrical disturbance in Relator's proposed line might cause such interference as would overshadow, suppress, or make unintelligible radio reception or use of such type of equipment. Their conclusions, based on tests made by them under Relator's overhead 33,000 and 132,000 volt lines east of the city of Euclid, disclose the following facts: that interference was detected when the tests were made *under* the lines; that more interference was caused by a 33,000 volt line than by a 132,000 volt line; that such interference

would not affect radio receivers located 100 feet or more from the lines; that signals transmitted or received by a radio in a police car or fire truck would momentarily be affected while the vehicle was passing under the electric line. One witness would not venture an opinion as to the effect, if any, the proposed line would have upon a homeowner's television set; the other stated that a television set located 100 feet or more away from the line would not be affected by the line, unless, perhaps, there were a fault or outage in the line close to the location of the television set. Obviously, 60,000 people in the City of Euclid do not live under the proposed line, nor even near to it; and certainly police cars and fire trucks would not remain under or near the line. The evidence introduced by Respondents falls far short of proving their claim that the proposed line will seriously interfere with the operation of radio and television sets in the city of Euclid; in truth, whatever interference might exist is negligible, and this I find as a matter of fact.

Respondents called as an expert witness a real estate broker who also serves at times as an appraiser of real estate. He was employed to make a study of the real estate in the city of Euclid which might be affected by Relator's proposed overhead line. When asked by counsel for Respondents whether the city of Euclid would suffer a tax duplicate loss with resulting loss of tax revenues by reason of the lands and buildings in and near the industrial area being depreciated by the construction of Relator's proposed line, and when counsel offered in evidence the written report of the witness, counsel for Relator objected and I sustained the objection. My reasons for so ruling are that, as the preliminary examination of the witness shows, any opinion he might have on the subject was based, in part at least, upon information presented

privately to him but not offered in evidence at the trial; that no specific facts or valid reasons were presented by him upon which he based his conclusions; that, from all that appears, no consideration was given by him and, therefore, no estimate was made by him as to the value of Relator's fixtures and facilities which would be *added* to the tax duplicate. Moreover, it seemed to me that whatever opinion he might have would necessarily be highly conjectural. A proffer of the written report of the witness, addressed to Respondent's counsel, was made. It is Respondents' Exhibit X. It is important to observe that counsel for Respondents stated that the purpose of the proffered evidence is to support Respondents' theory that Ordinance No. 78-1957 is a proper exercise of the police power. However, it is well established that the proffered evidence is not admissible for such purpose. The police power can lawfully be exercised only when it is invoked to promote and protect the public health, safety, morals, or welfare. It is not designed for the preservation of the economic value of property, or to enable a municipality to inflate its taxable revenue. These objectives overleap the bounds of a municipality's police power. *Elizabeth Lake Estates v. Township of Waterford*, (1947) 317 Mich. 359, 26 N. W. 2d 788; and this is true even if the legislation is in the form of zoning regulations. *122 Main Street Corporation v. City of Brockton*, (1948) 323 Mass. 646, 84 N. E. 2d 13; *Tranfaglia v. Building Commissioner of Winchester*, (1940) 306 Mass. 495, 28 N. E. 2d 537; *Elizabeth Lake Estates v. Township of Waterford, supra; Frischkorn Construction Co. v. Redford Township*, (1946) 315 Mich. 556, 24 N. W. 2d 209; *Senefsky v. City of Huntington Woods*, (1943) 307 Mich. 728, 12 N. W. 2d 390. Furthermore, I do not approve the theory that the value of land peculiarly adapted for industrial uses will be depreciated by the pres-

ence of an overhead transmission line which, at all times, will furnish industries in the area an adequate supply of electricity. It seems to me the converse is true. If lands in an industrial area are deprived of a cheap but adequate and reliable source of electric power, they would certainly be less desirable for industrial purposes and their value would, therefore, be greatly reduced. Unquestionably ample and ever-ready electric power has brought many industries to the city of Euclid and additional millions of dollars in payrolls to a village which once lazed in the hot sunshine and provided a meagre livelihood from its vineyards.

As I have pointed out before, Relator's right to do business in the city of Euclid is derived from the State subject, of course, to the consent of the city to use its streets. That consent has been granted. Unquestionably, the franchise right to construct overhead lines, like any other franchise right, is subject to reasonable regulation. But Ordinance No. 78-1957 is in no sense a regulatory measure; on the contrary, it is an absolute and unqualified prohibition. "Regulation" does not by any ordinary or usual definition include "prohibition." On the contrary, the power to regulate would seem to negative the power to prohibit. The power to regulate implies the existence, and not the destruction, of the thing to be controlled. *Frecker v. City of Dayton*, (1949) 88 Ohio App. 52, 85 N. E. 2d 419, aff'd 153 Ohio St. 14, 90 N. E. 2d 851. Ordinance No. 78-1957 does not attempt to prescribe rules and regulations to ensure the safe construction and proper maintenance of an overhead line carrying more than 33,000 volts; instead, it unequivocally prohibits its construction under any and all circumstances. This the city of Euclid cannot lawfully do. It is true that the city may, within reasonable limits, regulate the construction and main-

tenance of overhead lines, but it cannot prohibit them and require Relator to place its lines underground. In *Long Island Lighting Co. v. Village of Old Brookville*, (1947) 72 N. Y. S. 2d 718, aff'd 272 App. Div. 856, aff'd 298 N. Y. 569, 81 N. E. 2d 104, plaintiff desired to run its overhead transmission lines through the village on private rights of way. The village attempted to prevent their construction for the reason that the towers and lines were, by a village ordinance, banned in residential areas of which the village largely consists. Plaintiff was granted an injunction against the city. The trial court said (p. 720):

> "The Village urges that it is entitled to regulate the placing and maintenance of the power line. That is not the question before the Court in this action. There is no evidence that the Village has attempted by ordinance or otherwise to regulate the maintenance of power lines. Thus far, it has endeavored to prohibit their erection and maintenance on private property and has thereby, in the Court's opinion, attempted to exceed its power. There will accordingly be judgment for the plaintiff on the merits for the relief demanded in the complaint * * *."

In *Consolidated Edison Co. v. Village of Briarcliff Manor*, (1955) 208 Misc. 295, 144 N. Y. S. 2d 379, a mandamus action, the company sought to acquire a permit to erect and maintain a high tension overhead line through a residence district in the village. The action was brought on the theory that the village zoning ordinance prohibiting the erection of such a line in the village is illegal and void. In directing the issuance of the permit sought, the court said (p. 299):

> "Now, upon the undisputed facts, there is necessity for the public utility improvement proposed by the petitioner and the only bar to the same is the local ordinance of this village. The question is, does this village

have the right to absolutely bar the passing through it of a high-tension line required in the interests of the public. In this connection, it is to be noted that public utility corporations of the nature and type of the petitioner are created and regulated by State law. There is the absolute mandate of State law that the petitioner shall 'furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.' * * * The petitioner has the franchise and right, and furthermore the duty, subject to reasonable regulations, to erect and maintain the proposed transmission line, and no local government unit shall nullify or interfere with that right and duty. Such a unit may not, without unequivocal and express statutory grant of authority, enact a local ordinance tending to abrogate or contravene the State law and policy with respect to such a utility. The general grant of power to a municipality to adopt zoning laws in the interest of public welfare does not have the effect of permitting the local legislative body to override such State law and policy. Thus, the provisions of the particular zoning ordinance of this village are invalid insofar as they absolutely prohibit the petitioner from constructing and maintaining through the village a publicly needed high-tension line."

But even were it true that Ordinance No. 78-1957 is a regulatory, not a prohibitory, measure, the question still remains whether it is a reasonable and fair regulation since, if it is not, it must be declared void and of no effect. The case of *Rockland Electric Co. v. Borough of Montvale*, (1928) 104 N. J. L. 480, 141 Atl. 637, is quite similar to the case at bar and well illustrates this principle. The laws of New Jersey granted a franchise to electric companies to occupy the streets of municipalities with poles, lines and fixtures but "subject to such regulations as may be first imposed by the corporate authorities of such cities and

town." In 1910, the Borough of Montvale passed an ordinance consenting to the use of its streets by the Rockland Electric Company. In 1927, the town enacted an ordinance which, among other things, provided that no permit should be granted for installing overhead lines having a voltage of more than 2500 volts. The Supreme Court struck down the ordinance as being an arbitrary and unreasonable exercise of the police power. At the outset, the court said (p. 483):

> "If the ordinance under review is legal and the [company] cannot carry on its poles current of a voltage over two thousand five hundred volts, then it cannot give the service which the law demands, unless permission is given by the borough of Montvale to place conduits beneath the surface of the streets into which the wires for the conveyance of current shall be placed. This appears to be the indirect purpose of the ordinance. Montvale has a population of twelve hundred. The cost of an underground conduit system would be large. If placed in one municipality other municipalities would for aesthetic reasons probably ask for like consideration. Such a course would result in the necessity of higher rates for the [company]. An application to the utility board for higher rates would result in opposition from the consumers. Litigation would be commenced which is frequently ruinous to a utility and always to be deplored from any aspect of the case. It is for these reasons important that the ordinance under review should be examined with great care."

Proceeding then to consider the section of the ordinance prohibiting overhead construction, the court held as follows (p. 484):

> "The respondent claims this provision is a proper exercise of the police power by the borough. The [company] contends that the provision is unreasonable,

and for that reason this section of the ordinance is illegal and void.

The testimony taken and included in the record is conclusive that the |company| to meet the requirements of its business must carry through its wires in Montvale a current of at least four thousand volts. The testimony shows that in the city of Englewood, which has a population of at least ten times the size of Montvale, electric wires carrying currents of twenty-six thousand volts are placed above the ground. Transmission lines above ground carrying from one hundred and ten thousand to one hundred and thirty thousand volts are in use in highways by the public service company. The expert for the respondent admitted it is more economical to carry electric current above ground, and that there could be a dangerous condition created if the wires were placed underground, as for example the hitting of a cable by a workman while using a pick or tool. |It might be interjected here that, as to this last point, an excavating contractor called as an expert witness by Respondents in the case of bar, made a similar admission with respect to the use of his excavating machinery.| The same expert also admitted that a current of five hundred volts was considered dangerous, that under certain conditions a wire carrying one hundred and ten volts might become very dangerous, and that from a practical standpoint two thousand five hundred volts is as dangerous as twelve thousand volts. Transmission lines are under the supervision and control of the public utility commission and the work upon them is done in conformity to the board's rules. From the evidence submitted we gather that the protection to the users of the highways against accidents occurring by shocks of electricity is in the method adopted for the installation of the wires and the precautions taken to guard the wires when installed. The public, as users of the highway, are protected in the case of the overhead wires of the |company| both by the provisions

contained in the January, 1910, ordinance and the supervision and control of the utility board. There is nothing in the testimony which shows that the two thousand five hundred volts fixed in the ordinance as the line of demarcation between safe and dangerous electric currents has any basis upon which to rest. It is arbitrary, as danger can come from a current of one hundred and ten or five hundred volts as readily as from a current in excess of two thousand five hundred volts. This section of the ordinance we deem unreasonable. It cannot, aside from other considerations, be sustained as a reasonable exercise of the police power."

The same principle has frequently been applied with reference to ordinances compelling telephone and telegraph companies to place their wires underground. In *American Union Telegraph Co. v. Town of Harrison* (1879) 31 N. J. E. 627, 174 Atl. 55, plaintiffs' poles were erected within the town but outside of the streets and upon private property. The wires overhung some twenty streets at an elevation of about twenty-five feet above the roadway. The poles were erected with permission of the owners of the lands, but without permission of the town authorities. The latter threatened to cut down the lines and the plaintiff sought and obtained an injunction. The court said (p. 630):

"The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate, but not to interdict. And their regulations, to be valid, must be reasonable and fair."

In support of their claim that Ordinance No. 78-1957 is an unreasonable, arbitrary and illegal exercise of the police power, counsel for Relator cogently argue that the

council of the city of Euclid cannot lawfully require Relator to place its proposed transmission line underground since the cost of constructing such a line would be excessive, if not prohibitive, and there is no real or compelling necessity for it.

During the trial, counsel for Respondents said: "Cost has nothing to do with whether a police power regulation is valid or not," and in their brief they argue that when a municipality enacts an ordinance designed to protect the public health, safety, morals, or welfare, the exercise of the police power escapes the ordinary constitutional limitation of reasonableness of cost. Counsel have cited cases wherein general statements to that effect appear. It is true—and I think this is as far as the courts go—that the cost resulting to a public utility from required compliance with a regulatory ordinance passed by a municipality, or from the required compliance with an order of a public utility commission, is not necessarily a controlling factor in determining whether such ordinance or order is a lawful one. Nevertheless, it is an important factor (*In re Boston Edison Co.* (1949) 79 P. U. R. (n.s.) 1 (Mass. D. P. U.)) and one which must be considered where the validity of the ordinance or order is challenged on the ground that it is an unfair, unreasonable, and oppressive mandate which cannot, under the particular circumstances of a given case, be justified and upheld. It is well-established, I believe, that where the cost is questioned, it becomes the duty of the court to determine whether it is within reasonable limits. *Nashville, Chattanooga & St. L. Ry. v. Walters*, (1935) 294 U. S. 405; *Lehigh Valley R. R. v. Board of Public Utility Commissioners*, (1928) 278 U. S. 24; *Rockland Electric Co. v. Borough of Montvale*, (1928) 104 N. J. L. 480, 141 Atl. 673; *In re Elimination of Existing Highway-Railroad Crossing at Grade*, (1938) 254 App.

Div. 412, 5 N. Y. S. 2d 946; *Property Owners and Residents of Westchester County v. Westchester Lighting Co.*, (1932) 1932 C. P. U. R. 503. The last is a well-considered case, the facts of which are strikingly similar to the case at bar.

I have carefully reviewed and weighed all of the testimony in the record and have examined the statistics set forth in exhibits introduced in evidence by Relator, which bear upon the subject of cost. Although there is conflicting evidence with respect to some of them, the preponderance of the evidence clearly establishes the following facts: the estimated cost of the proposed overhead line, exclusive of the right of way, is $816,900.00 or $10.31 per foot; the estimated cost of an underground line serving the same purpose is $4,468,000.00 or $55.95 per foot; the excess cost of constructing the line underground is $3,478,600.00 which, approximately, is seven times larger than the cost of constructing it overhead; this increased investment requires annual carrying charges in the form of depreciation, interest, taxes, and other factors, the impact of which would mean that annual costs to Relator for having this line underground would be $500,000.00 greater than with the line constructed overhead; the impact of increased costs will be reflected in higher electric rates to the public as consumers. The evidence also indicates that another important factor enters into the question of costs, namely, relocation of Relator's facilities whenever necessary for the construction of new highways, freeways, and the like. The testimony on this subject shows that the cost of relocating underground lines is excessively disproportionate to that of overhead lines.

During the course of the trial, counsel for Respondents seemed to intimate that part of the line could be built overhead and part underground, the inference being that the portion of the line located in the city of Euclid could

be placed underground. The testimony introduced by Relator on this subject clearly shows that the construction of a high voltage line in this manner would be utterly impractical; that a large amount of costly special equipment would be required together with sufficient land upon which it could be erected; that the total cost of partial overhead, partial underground and again partial overhead in turn would be substantially the same as full underground.

In my judgment the effect of Ordinance No. 78-1957 is unduly oppressive. It inflicts an intolerable hardship upon Relator by compelling it to make an excessive, wasteful, and needless investment which has no foundation in reason and is a mere arbitrary or irrational exercise of power having no real or substantial relation to the public health, safety, morals or the public welfare in its proper sense. It is not alone the prohibitive monetary loss to Relator which here compels a finding of invalidity, but that such loss is utterly unrelated to any substantial benefit to be derived. The testimony of Respondents' witnesses upon this subject does not alter my conviction that Relator has established its claim by clear and convincing evidence.

In conclusion, I find, as a matter of fact and of law, that the restraints imposed upon Relator by the city of Euclid, under and by virtue of Ordinance 78-1957 preventing it from constructing and operating its proposed overhead transmission line within the city, are in violation of its franchise and present an extreme case of harshness and oppression; that since the ordinance, under the circumstances of this case, bears no real or substantial relationship to the public health, safety, morals, or welfare, I find the same to be unnecessary, arbitrary, and unreasonable and therefore invalid as being in contravention of Relator's constitutional rights under Section 28 of Article I of the

Constitution of Ohio and under Section 10, Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Another ordinance involved in this case, and challenged by Relator, is the city's Zoning Ordinance. Respondents contend that Relator's application for a permit to cross six streets in the city of Euclid with its proposed tower line was properly refused by the council of the city for the reason that the planned construction of the line does not meet the requirements of the zoning ordinance of the city of Euclid (Ordinance No. 2812, effective October 13, 1922), in that the height of Relator's steel towers, from which the conductors will be suspended, will be in excess of 80 feet. Relator insists, however, that the permit applied for is to cross six streets of the city, and that the ordinance has no application. It should be observed, however, that, as a practical matter, any line that crosses the streets at high altitudes must be supported by towers which, if not on city streets, must stand on privately owned lands. The latter, of course, are, under proper circumstances, within the ambit of the zoning ordinance. I feel, therefore, that it is incumbent upon me to determine whether, as a matter of fact and of law, the ordinance is valid insofar as it applies to the use of private lands by Relator for the erection of its towers, the lands being zoned for industrial uses.

Pertinent sections of the zoning ordinance are:

Section 13: Height Districts.

(1) * * *

(2) * * *

(3) In a class H3 district no building shall be erected to a height in excess of 80 feet.

Section 14: Height District Exceptions.

(a) The provisions of the preceding section shall not apply to restrict the height of a church spire, bel-

fry, clock tower, wireless tower, chimney flue, water tank, elevator bulkhead, stage tower or scenery loft.

(b) The City Planning and Zoning Commission may, after public notice and hearing and subject to such conditions and safeguards as the commission may prescribe to protect the appropriate use of neighboring property, permit the erection of a building or portion of a building covering not more than 25 per cent of the area of the lot to a height in excess of the limits prescribed in the preceding section, which permission shall be confirmed by resolution of the Council before becoming effective.

Section 2. Definitions.

(a) * * *; the word "Lot" includes the word "plot" and word "building" includes the word "structure."

Class H3 is one of the three classes of height districts in Class U6 which is one of six use districts and is restricted to industrial and manufacturing purposes. In general, this embraces the lands lying between the New York Central Railroad and the Nickel Plate Railroad for the entire length of the city and extending some distance on either side to the north and south, having an average width of about 1600 feet, with slight exceptions.

The evidence shows that Relator's proposed towers will be 85 feet or more in height. Respondents argue that zoning is everywhere recognized as a proper exercise of the police power and is authorized by the Home Rule Amendment, Section 3, Article XVIII, of the Constitution of Ohio. Relator contends that, being a public utility company, it is not subject to the zoning ordinance and that even if it were the ordinance, as applied to Relator under the circumstances of this case, is unconstitutional and void since it bears no real and substantial relation to the public health, safety, morals, or welfare.

The purpose of the proposed line is to provide additional transmission facilities urgently needed. The public have an interest in the use of electricity and in the efficient and proper performance of every power within the franchise conferred upon Relator; hence, every facility needed by it is for public purposes, and whatever is required to enable it to perform its duty to the public is within the principle which permits a delegation of power to it. No one, I think, would now deny that the furnishing of electricity t the public for light, heat, or power—that is to such members of the public within a given territory as may desire the current for any or all such purposes—is a public use, for which the power of eminent domain may be exercised. *Rockingham County Light & Power Co. v. Hobbs*, (1904) 72 N. H. 531, 58 Atl. 46; *McCrady v. Western Farmers Electric Cooperative*, (1958) Okla. , 323 P. 2d 356; *Tuttle v. Jefferson Power & Improvement Co.*, (1912) 31 Okla. 710, 122 Pac. 1102. There is ample evidence in the record here to sustain a finding of reasonable necessity and of public use. The right of eminent domain, which is but a right of the people or government to resume the possession of lands for public use, and subject to which right property is always held, may be delegated to individuals, corporations or municipalities for like use. That the construction and operating of an electric light and power system is such a use as justifies a delegation of this right is now beyond question, and is not open for consideration. *New York & Harlem R. R. v. Kip*, (1871) 46 N. Y. 546. It is manifest that Relator is engaged in a business serving public needs. Because of the nature of such business, the State of Ohio, through the General Assembly, has conferred upon it the power of eminent domain. *State ex rel. Kearns v. Ohio Power Co.*, (1955) 163 Ohio St. 451, 127 N. E. 2d 394. Section 4933.15, R. C., expressly grants

an electric company the right of eminent domain for the erection and operation of its electric power system including its lines, poles, towers and other facilities. *Ohio Power Co. v. Deist*, (1951) 154 Ohio St. 473, 96 N. E. 2d 771. So far as the merits of the instant case are concerned, the privately owned lands used by Relator for its overhead line though held by purchase, must be held in the same light as if they had been originally acquired by Relator in the exercise of the compulsory power vested in it by the General Assembly to appropriate private property for public use. Furthermore, a public utility, authorized by law to acquire a right of way by eminent domain whenever necessary, has an equivalent scope of discretion in its selection of a route for its transmission lines where it is able to acquire it by negotiation. *Transcontinental Gas Pipe Line Co. v. Borough of Milltown*, (1950) 93 F. Supp. 287. In any event, whether the lands be acquired by purchase, or by its vested right of eminent domain, they are held by Relator dedicated to that public use.

A public utility, when appropriating property, is exercising the State's right of eminent domain and is nothing more, in principle, than the agent or instrument of the State. *Lamb & McKee v. Lane*, (1854) 4 Ohio St. 167, 178. It follows, therefore, that a zoning ordinance of a municipality insofar as it attempts to cut down or deprive a public utility of the full enjoyment of its property rights acquired for public use cannot be upheld. The sovereign's power of eminent domain, whether exercised by the State itself or by a public utility company to which it has been delegated, takes precedence over a municipality's police power to zone. The courts of Ohio have repeatedly held that the delegation by the State of the power to exercise the State's power of eminent domain in order to make effective the franchise granted to such corpora-

tions by the State, negates the existence of any power in a municipality to preclude or burden the exercise of the corporation's power by attempting to limit or prohibit the use of lands for the purposes in aid of which the power of appropriation was delegated. *Lamb & McKee v. Lane, supra; Cincinnati R. R. v. Belle Center,* (1891) 48 Ohio St. 273, 27 N. E. 464; *City of Cincinnati & Louisville & N. R. R.* (1913) 88 Ohio St. 283, 102 N. E. 951; *Doan v. Cleveland Short Line Ry.*, (1915) 92 Ohio St. 461, 112 N. E. 505; *Norfolk & Western Ry. v. Gale,* (1928) 119 Ohio St. 110, 162 N. E. 385. In the latter case, the Court held that provisions in a zoning ordinance exempting a possessor of the power of eminent domain from the restrictions of the ordinance were not necessary since the power of eminent domain gave its possessor the right "to erect the necessary public buildings in the restricted residential zone." In *State, ex rel. Ohio Turnpike Commission v. Allen;* (1952) 158 Ohio St. 168, 107 N. E. 2d 345, the Court, in the course of holding the Turnpike Act a constitutional enactment, was met with the contention that the "turnpike will pass through territory that had been zoned and this will constitute a use in violation of the zoning ordinance." The Court held that the *Doan* and the *Gale* cases, *supra,* disposed of that contention. The State or one of its agencies possessing the power of eminent domain cannot be restricted by zoning ordinances or restrictive covenants. Obviously the right of eminent domain comprehends the power to *use* as well as the power to *take.* This is especially true when public utilities face practical problems which are the result of mechanical and scientific progress. Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these essentials elements of property, to that extent de-

stroys the property itself. The substantial value of property lies in its use. In *State, ex rel. Helsel v. Board of County Commissioners*, (1947) 79 N. E. 2d 698, aff'd 78 N. E. 2d 694, Judge McNamee, in a well-considered and able opinion said (p. 704):

> "To suppose that zoning ordinances may limit or prevent the public use for which land is taken is to invest municipalities with power to restrict the exercise of the power of eminent domain."

As already indicated, it is immaterial whether the power of eminent domain is actually exercised to take property in a particular instance. The determining factor is the *use* of property for public purposes by one possessing the power of eminent domain. In the *Doan* and *Gale* cases, *supra*, the property had in fact been acquired by purchase. Viewed in the light of the foregoing decisions, I am persuaded that the zoning ordinance of the city of Euclid is not applicable to the lands acquired, or to be acquired, by Relator for the purpose of erecting thereon the steel towers necessary to the construction and operation of Relator's proposed overhead transmission line. Respondents, however, earnestly argue that the case of *State, ex rel. Kearns v. Ohio Power Co.*, (1955) 163 Ohio St. 451, 127 N. E. 394, holds that municipalities, by zoning ordinances, can regulate the use of lands owned by, or under the control of, public utility companies possessing the power of eminent domain; that, in effect, that case overrules all of the cases to which I have referred. I do not believe the *Kearns* case does any such thing. Certain it is that the Court itself did not expressly declare that result. In that case it appears to have been conceded by the relator that a public utility was not subject to regulation by zoning laws, but it was contended that different considerations applied to *community planning*. The distinction is important and it was

not overlooked by the Court. Judge Zimmerman said (p. 406):

> "Although they are sometimes used interchangeably the terms 'zoning' and 'planning' are not synonymous. Zoning is concerned chiefly with the use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly included within the police power."

McQuillin, Municipal Corporations, (3d ed., 1957) § 25.08 points out that zoning regulates use of buildings; planning comprehends community development. It is important, therefore, that it be observed that, in the case at bar, this Court is not dealing with a general and overall plan prepared and adopted by a city planning commission pursuant to Section 713.25, Revised Code, nor with a general and overall plan prepared and adopted by a regional planning commission which, in turn, has been adopted by the city of Euclid. No evidence was introduced showing the existence of either one of such plans, and counsel for Respondents admit that no such plan exists. Sections 713.01 to 713.21, R. C., authorize the appointment and specify the powers of three types of planning commissions—city, regional, and county. There is no evidence in the record showing the existence of any plan prepared and adopted by any planning commission; indeed, there is no evidence that any planning commission as that term is used in the aforesaid sections of the Revised Code, exists within the County of Cuyahoga. It is plain, therefore, that the question involved in the instant case was not present in the *Kearns* case. The Court conceded that the power company's right to pursue its busi-

ness, to construct and maintain its power lines, and to exercise its power of eminent domain could not be challenged, but, in the exercise of these rights, it was subject to reasonable regulations in conformity with a plan prepared and adopted by a lawfully created Regional Planning Commission pursuant to Section 713.25, R. C. Had the facts of the *Kearns* case arisen in a city which had established a City Planning Commission under Section 713.01, Revised Code, the result of the *Kearns* case itself might have been different. The power granted to such commissions is expressly limited. Section 713.02, R. C., provides:

> * * * This section does not confer any powers upon the commission with respect to the construction, maintenance, use, or enlargement of improvement by any public utility * * * or its own property if such utility is owned or operated by * * * a corporation for profit * * *.

Since the facts of the *Kearns* case are clearly distinguishable from the facts of the case at bar, I am still of opinion that the zoning powers of municipalities in Ohio with respect to public utilities do not extend to any control over a utility's activities upon its own property.

But if I am wrong in reaching this conclusion, there is another potent reason why the zoning ordinance in question here cannot lawfully and fairly be applied to Relator. In ascertaining whether the application of the challenged zoning ordinance to Relator's property rights satisfies constitutional guaranties, the character of the property in the area through which its proposed line passes requires consideration. The route of the line is along private right of way in a district zoned for industrial purposes and unsuited for any other purpose. Factories and industrial plants of all sizes and kinds border upon the right of way; large gas reservoirs add their towering profiles to the area.

Relator's network of poles supporting a number of conductors carrying 33,000 volts stand upon the opposite side of the Nickel Plate Railroad's tracks. On each side of the railroad tracks there is considerable vacant land. One of Respondents' witnesses testified that 146 acres are unoccupied. The highest and best use thereof is industrial; it is not suited for residential development. It is difficult, therefore, to perceive how a few well-designed symmetrical steel towers would cause any noticeable change in the character or appearance of this industrial corridor; nor is it clear how the few residences facing their respective streets some distance away to the south and separated from Relator's right of way by the railroad tracks and by garages at the rear of such residences, would be harmed in the slighest degree by the erection of Relator's steel towers.

The law of zoning has developed rapidly from its comparative recent origin until now certain well-defined principles have become fixed in law to guide courts in their consideration of current zoning cases. I shall state briefly the applicable principles which I believe are dispositive of the question here presented. There is no longer any doubt as to the constitutionality of reasonable zoning ordinances. *Village of Euclid v. Ambler Realty Co.*, (1926) 272 U. S. 365. A city may adopt zoning ordinances as an exercise of its police power and thereby impose a reasonable restraint upon the use of private property. But it is equally well-established that the governmental power to enact zoning regulations is not unfettered, and where the ordinance assailed bears no real and substantial relation to the public health, safety, morals, or welfare the ordinance cannot be upheld as a valid exercise of the police power. *Nectow v. City of Cambridge*, (1927) 272 U. S. 172; *Village of Euclid v. Ambler Realty Co., supra; Hanni-*

ter Corporation v. City of Berwyn, (1953) 1 Ill. 2d 28, 115 N. E. 2d 315; *Pioneer Trust & Savings Bank v. Village of Oak Park*, (1951) 408 Ill. 449, 97 N. E. 2d 302; *Hitchman v. Township of Oakland*, (1951) 329 Mich. 331, 45 N. W. 2d 306; *Senefsky v. City of Huntington Woods*, (1943) 307 Mich. 728, 12 N. W. 2d 390; *Kessler v. Smith*, (1957) 104 Ohio App. 213, 217, 142 N. E. 2d 231, appeal dismissed 167 Ohio St. 91, 146 N. E. 2d 308. A mere declaration in the ordinance that it is enacted to protect public safety, health, or welfare will not render the ordinance valid as being within the police power unless there is some reasonable relation between such propose and the regulation prescribed. *City of Youngstown v. Kahn Bros. Building Co.*, (1925) 112 Ohio St. 654, 658, 148 N. E. 842. Whether the means employed have any real and substantial relation to the public health, safety, morals or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. *Nectow v. City of Cambridge, supra; Lawton v. Steele*, (1894) 152 U. S. 133; *Pioneer Trust & Savings Bank v. Village of Oak Park, supra; Senefsky v. City of Huntington Woods, supra; City of Cincinnati v. Correll*, (1943) 141 Ohio St. 535, 49 N. E. 2d 412; *State, ex rel. Synod of United Lutheran Church v. Joseph*, (1942) 139 Ohio St. 229, 39 N. E. 2d 515. Obviously, each case must be determined upon its particular facts. *Miller Brothers Lumber Co. v. City of Chicago*, (1953) 414 Ill. 162, 111 N. E. 2d 149; *Offner Electronics, Inc., v. Gerhardt*, (1947) 398 Ill. 265, 76 N. E. 2d 27; *Frischkorn Construction Co. v. Redford Township Building Inspector*, (1946) 315 Mich. 556, 24 N. W. 2d 209; *Senefsky v. City of Huntington Woods, supra; State, ex rel. Cook v. Turgeon, Building Commissioner*, (1947) 84 Ohio App. 387, 77 N. E. 2d 283. A zoning ordinance valid in its general aspects may be void when applied to particular

property. The general scheme of a zoning ordinance may be valid, yet, as applied to a particular land or lands within the area zoned, such facts may exist that if the terms of the ordinance are enforced it would amount to an arbitrary and unreasonable restriction, resulting in hardship and injury to the owner of the property. *City of Chicago v. Sachs*, (1951) 1 Ill. 2d 342, 115 N. E. 2d 762; *People, ex rel. Kirby v. City of Rockford*, (1936) 363 Ill. 531, 2 N. E. 2d 842. Zoning ordinances governing the location and construction of buildings and other structures are usually designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; and to avoid undue concentration of population. It is manifest that none of these purposes will be subserved in the instant case.

It should be observed that there is here no challenge of the power of the city of Euclid to enact the comprehensive zoning ordinance in question. Counsel for Relator do not attack the validity of the ordinance in general. Their claim is that Section 13 (3) of the ordinance as applied to the property rights acquired by Relator is invalid as to it under the circumstances of this case because that section bears no real and substantial relation to the public health, safety, morals, or welfare. Respondents appear to claim that the validity of the provisions of the zoning ordinance cannot now be questioned and cite the *Ambler* case, *supra*, as authority for this proposition. I do not approve that view. In that case the relief sought by the Realty Company was an injunction against the enforcement of the entire ordinance, not against any specific provision or provisions thereof. The Court held that the ordinance was a valid exercise of authority but took pains to point out that it was not passing upon the validity of all of its provisions.

(p. 395) "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them or even many of them, may be found to be clearly arbitrary and unreasonable."

(p. 397) "Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them."

The law books are filled with cases where courts have held zoning ordinances, or portions thereof, invalid. In *Nectow v. City of Cambridge*, (1927) 272 U. S. 172, the court struck down a zoning ordinance redistricting plaintiff's land in a residence district since it would not promote the health, safety, or general welfare of the community. In *Consolidated Edison Co. v. Village of Briarcliff Manor*, (1955) 208 Misc. 295, 144 N. Y. S. 2d 379, a zoning ordinance prohibiting the erection of a high tension power line in the village was, for the same reason, held illegal and void. See also *Long Island Lighting Co. v. Village of Old Brookville* (1947) 72 N. Y. S. 2d 718, aff'd 77 N. Y. S. 2d 143, aff'd 298 N. Y. 569, 81 N. E. 2d 104, discussed earlier herein. In *Transcontinental Gas Pipe Line Corp. v. Borough of Milltown*, (1950) 93 F. Supp. 287, a city zoning ordinance prohibiting the utility from constructing its transmission line along a route chosen by it, was held invalid since there was no showing that the pipe line would endanger the health, safety, or welfare of the residents of the town. In *Federal Electric Co. v. Zoning Board of Appeals of the Village of Mount Pleasant*, (1947) 398 Ill.

142, 75 N. E. 359, a zoning ordinance limited the height of buildings, steeples and chimneys to 24 feet. Another clause provided that "Structures other than buildings shall not exceed 30 feet in height, except municipal water towers." Plaintiff requested a permit to erect neon signs which were higher than 30 feet. The zoning board refused to issue the permit. In reversing that decision, the court said (p. 147):

> "The owner's right in property, when unrestricted, extends not only downward under the surface but upward to a unlimited extent, and common experience demonstrates that the latter might sometimes be very valuable. In short, limitations as to the height of structures in a municipal ordinance must bear some relation to the public health, safety or welfare. It does not appear that the regulation in section 12 which limits the height of structures to 30 feet is in any way related to the public health, safety, or morals."

Issuance of the permit was, therefore, ordered. In some cities, the zoning laws expressly exempt electric power transmission lines from all zoning restrictions. In *Thompson v. City of Los Angeles*, (1947) 82 Cal. App. 2d 45, 185 P. 2d 393, plaintiffs attempted to restrain defendants from constructing an overhead steel tower line in the city. The towers, with three 25 feet crossarms on each tower, were quadruped steel structures 135 feet high and 20 feet square at the base. They were 600 feet apart. An injunction was denied since both the city and the county zoning ordinances permitted the construction of such line. In other large cities, the zoning boards have granted permission for the erection of such lines since they are necessary for the public convenience, comfort, and welfare and do not, when properly constructed and maintained, endanger the public health and safety. *Johnson v. Board of Zoning Appeals of Baltimore County*, (1950) 196 Md. 400, 76 A. 2d 736.

Numerous courts have, in determining the reasonableness or unreasonableness of a zoning ordinance, invoked the salutary rule that if the gain to the public is small when compared with the hardship imposed upon individual property owners, no valid basis for an exercise of the police power exists. *Nectow v. City of Cambridge*, (1928) 277 U. S. 183; *Pioneer Trust & Savings Bank v. Village of Oak Park*, (1951) 408 Ill. 449, 97 N. E. 2d 302; *Miller Brothers Lumber Co. v. City of Chicago*, (1953) 414 Ill. 162, 111 N. E. 2d 149; *Offner Electronics, Inc. v. Gerhardt*, (1947) 398 Ill. 265, 76 N. E. 2d 27.

Respondents regard *Kahl v. Consolidated Gas Electric Light & Power Co.*, (1947) 191 Md. 249, 62 A. 2d 754, as a leading case holding that an electric company is subject to local zoning powers and may be required by a city's zoning ordinance to place its high voltage lines underground. This particular case, however, involved only intermediate orders or interlocutory matters. The litigation involved the proposed construction of an overhead tower transmission line carrying 110,000 volts through the metropolitan district of the city of Baltimore. Respondents fail to disclose that the net result of the entire litigation was that the authorities, after considering all of the questions involved, concluded that the health, safety, and morals of the public allowed the kind of construction requested by the power company—the same kind of construction that Relator proposes here. See *Johnson v. Board of Zoning Appeals of Baltimore County*, (1950) 196 Md. 400, 76 A. 2d 736, to which reference has already been made herein.

It conclusively appears from the evidence in the case at bar that Relator's proposed line will be located in a pocket of industrial uses of a fixed and settled character; that it stands upon private right of way; that the lands on both sides of the Nickel Plate Railroad's tracks are, except

for industrial plants, unoccupied and are not suitable for any use other than industrial; that the line does not constitute or create a nuisance; that, with the consent of the city of Euclid, there exists along said railroad tracks a network of Relator's poles supporting six circuits, each carrying 33,000 volts; and that no more ideal location for the proposed steel towers of the proposed overhead line exists anywhere in the city of Euclid. I am satisfied that the limitation of the height of Relator's steel towers to 80 feet would not promote or protect the health, safety, morals or welfare of the inhabitants of the city of Euclid or the public in general, taking into account the character of the industrial corridor through which the proposed line will pass and the resulting benefit to accrue to the whole city. The application of Zoning Ordinance No. 2812 to prevent Relator's erection of safe towers might permanently deprive the community of an additional and much needed supply of electricity without accomplishing in the slightest degree, directly or indirectly, any of the purposes for which zoning is authorized. The unreasonableness of the height restriction becomes all the more apparent when it is remembered that the ordinance permits the erection of chimney flues, wireless towers, water towers, elevator bulkheads, stage towers, or scenery lofts in excess of a height of 80 feet.

Since the zoning ordinance presently permits Relator to erect steel towers not exceeding 80 feet in height, it is inconceivable that towers 85 feet or more in height would tend to impair the health, safety, morals, or welfare of the community; in fact, the opposite is true. Respondents offered not a whit of evidence showing that a high tower rather than a low one endangers, or tends to endanger, the public health, safety, or morals, or, in any manner, affects the general welfare. Certainly, if a transmission line pre-

sented any danger at all, one suspended from towers 80 feet or less would be far more dangerous than one suspended from towers of a height of 85 feet or more. It seems to me that it is futile to argue that a steel tower not exceeding 80 feet in height would best serve, in any way, the purposes of the public health, the public safety, or the general welfare, as those purposes are commonly understood.

On the basis of the foregoing analysis and factual conclusions, I find, therefore, as a matter of fact and of law, that Section 13(3) of Ordinance No. 2812, insofar as it attempts to restrict and limit Relator's towers, located not on public streets but on privately owned lands in an area zoned for industrial purposes, to a height of 80 feet, does not bear any real or substantial relation to the public health, safety, morals, or welfare; that it is harsh, arbitrary, prohibitive and utterly unreasonable; that it is, therefore, repugnant to the constitutions of the State of Ohio and of the United States, and consequently void and of no effect.

Respondents insist, however, that Relator is in no position to question the validity of the height-district limitation imposed by Section 13(3) of the zoning ordinance since Relator had an adequate remedy at law, to which it did not resort. Section 14(b) of the zoning ordinance, hereinbefore set forth, provides that the Zoning Commission of the city of Euclid may, under proper circumstances, permit the erection of a building or structure in excess of the limits prescribed in Section 13(3), "which permission shall be confirmed by resolution of the Council before becoming effective." Such clauses are quite common. In order to prevent the oppressive operation of the zoning law in particular instances, where the zoning restrictions are otherwise generally reasonable, the zoning

laws usually create a safety valve under the control of the zoning commission which may relieve against unnecessary hardship in particular cases. Where a zoning commission has lawful power to grant an exception or variance which, in its discretion, seems just and proper in any given case, it is generally conceded that resort to this administrative remedy is necessary before the aggrieved owner may seek relief in the courts.

Where, however, the constitutionality of a zoning ordinance is questioned, new problems arise. There is ample authority for the view that where a zoning ordinance is attacked in its *entirety*, it is not necessary to have employed the available administrative remedies, but where a zoning ordinance is attacked as to the unconstitutionality or unreasonableness of a *specific* provision, or provisions, the complainant is required to employ the available administrative remedies before the court will take jurisdiction of the controversy. Moreover, the rule has been applied whether such attacking actions are brought by way of Mandamus or by Injunction or by Declaratory Judgment proceedings. The Supreme Court of Ohio appears to have held that the aggrieved party must first exhaust his administrative remedies even in cases where the attack is made upon constitutionality of the ordinance in its entirety. *State, ex rel. Lieux v. Village of Westlake,* (1951) 154 Ohio St. 412, 96 N. E. 2d 414. Respondents regard that decision as dispositive of the question now under discussion. I disagree. I am of opinion that the specific holding in the *Westlake* case is not applicable to the case at bar since the facts upon which the court based its decision can be distinguished from those presented in the instant case.

What remedy is Relator seeking here that an administrative board may grant? It is seeking, not a variance, but to have the height-district restriction of the zoning ordi-

nance declared unconstitutional insofar as it affects Relator's property rights, a remedy clearly beyond the jurisdiction of the zoning commission. The remedy for attacking the validity of a zoning ordinance is distinguishable in every way from the remedy afforded of securing a variance from the zoning commission. The one is based on right; the other on favor. The one challenges the validity of the ordinance itself; the other must necessarily assume its validity. A property owner should not be compelled, before going to court, to resort to a municipal board to be exempted from the operation of an ordinance which the municipality was wholly without power to enact against him. *Cherry v. Brumbaugh, Building Inspector of the Village of Larchmont*, (1938) 255 App. Div. 880, 7 N. Y. S. 2d 956; *Vangellow v. City of Rochester*, (1947) 190 Misc. 128, 71 N. Y. S. 2d 672, aff'd 275 App. Div. 1036, 92 N. Y. S. 2d 414. Even though he was seeking a variance, an application therefor cannot be deemed a prerequisite to an attack upon the constitutionality of the ordinance where such variance could not, in any event, be granted. *Phipps v. City of Chicago*, (1930) 339 Ill. 315, 171 N. E. 289; *O'Brien Transfer & Storage Co. v. Village of Great Neck*, (1956) 2 A. D. 2d 690, 152 N. Y. S. 2d 588; *Ulmer Park Realty Co. v. City of New York*, (1943) 267 App. Div. 291, 45 N. Y. S. 2d 527.

I am convinced that the rule with respect to exhaustion of administrative remedies has no application here, since a request for a height-district exception or variance would have to be denied by the administrative departments of the city of Euclid. It will be remembered that Ordinance No. 288-1956, as amended by Ordinance No. 78-1957, expressly and unconditionally prohibits the construction of Relator's proposed overhead transmission line within the city of Euclid. The zoning commission, there-

fore, would have no authority to permit variations or changes in the height-district restriction since the proposed line itself is absolutely prohibited regardless of the height of its steel towers. Furthermore, the zoning commission could not pass upon the constitutionality of the zoning ordinance, insofar as it affects Relator, or upon the constitutionality of Ordinance No. 288-1956, as amended by Ordinance No. 78-1957. Such commission has no judicial power. It is an administrative agency, without judicial or quasi-judicial power. Being an administrative agency, it has no power to determine constitutional questions concerning the vested rights which Relator is seeking to protect. Any request by Relator would be a wasted effort. The zoning commission cannot amend or repeal Ordinance No. 288-1956, as amended by Ordinance No. 78-1957. This Court has held that a city council has no power to delegate legislative powers to an administrative agency (*Curtis v. City of Cleveland*, (1955) 130 N. E. 2d 342); nor can the zoning commission disregard the ordinances, but is bound to enforce them as written. Furthermore, the law does not require the doing of a vain and useless act (*Honigfeld v. Byrnes*, (1954) 14 N. J. 600, 103 A. 2d 598), and it would be futile for Relator to make an application to the zoning commission for an exception to the height-district regulation for towers to carry conductors across streets when two ordinances of the city expressly declare that such wires cannot be carried across the streets at all.

The zoning commission has no power to afford such relief to Relator as would constitute an adequate remedy at law; hence, Relator is not deprived thereby of any remedies to which it might be entitled in this Court. Respondents seem to have overlooked the fact that Judge Taft, in his opinion in the *Westlake* case, specifically points

out this exception to the rule announced and applied to the facts in that case. He said (p. 447):

> "Our conclusion is that an applicant for a building permit, whose application is refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus, compelling the issuance of such permit on the ground that the ordinance as a whole is unconstitutional, without first exhausting administrative remedies provided by such ordinance, *if such administrative remedies might enable her to secure such permit.*" (Emphasis supplied.)

In the case at bar, no discretionary administrative remedies could ever *enable Relator* to secure the permit. The zoning commission could not permit Relator to erect towers in excess of a height of 80 feet since the prohibitory ordinances hereinbefore mentioned absolutely forbid the construction of Relator's proposed overhead line. I have not been cited to any case, nor have I found one, holding that resort must be had to an administrative agency when the agency itself *has no power to act*. Furthermore, in the case here, any variance that might otherwise have been granted would still not be effective unless "confirmed by resolution of the Council." One would be bold indeed to assume or expect that the council of the city of Euclid would permit that which it had already, by two ordinances, absolutely prohibited; and certainly there is no duty upon Relator to seek to have the prohibitory ordinances amended or repealed. *Ulmer Park Realty Co. v. City of New York*, (1943) 267 App. Div. 291, 45 N. Y. S. 2d 527.

In the case at bar, the only questions involved are pure questions of law, namely, (1) the construction and validity of the height-district limitation set forth in Section 13(3) of the zoning ordinance, and (2) the operation and effect of Ordinance No. 288-1956, as amended by Ordi-

nance No. 78-1957. There would have been no point in Relator's making application for an exception or variance, since the zoning commission is not designed as a judicial body to pass upon legal questions. As I have said before, its function is not to construe statutes or ordinances, or to resolve constitutional issues. *Hedgcock v. Building Inspector*, (1932) 91 Colo. 155, 13 P. 2d 264; *Fischer v. Township of Bedminister*, (1950) 5 N. J. 534, 76 A. 2d 673; *Honigfeld v. Byrnes*, (1954) 14 N. J. 600, 103 A. 2d 598; *Cherry v. Brumbaugh*, (1938) 255 App. Div. 880, 7 N. Y. S. 2d 956; *Consolidated Edison Co. v. Village of Briarcliff Manor*, (1955) 208 Misc. 295, 144 N. Y. S. 2d 379.

Under the circumstances of the case at bar, Relator has not forfeited its right to contest the validity of the height-district limitation in the zoning ordinance, and the question is, therefore, properly before this Court. I have purposely left to the last the following questions: (1) whether mandamus is the appropriate medium for the assertion and enforcement of Relator's legal rights; (2) whether Relator has established a clear right to the issuance of the permit requested; (3) to whom may the writ of mandamus be allowed to issue. I shall discuss these questions in that order.

Respondents vigorously deny that mandamus is the proper remedy here and have presented a rather formidable list of authorities which they contend support their view. The length of this report will not permit reference to all those cases, but it may be said in passing that the facts in some of the cases are so radically different from the facts in the case at bar that the opinions of the courts render little, if any, assistance to this Court in resolving

the question now under discussion. Respondents have accurately stated many of the general propositions of law governing the remedy of mandamus, but general expressions of law do not necessarily control in all cases. In this connection, I am not unmindful of the prudent warning given by Chief Justice Hughes, in *Wright v. United States*, (1938) 302 U. S. 583, 593, where he said:

> "The oft-repeated admonition of Chief Justice Marshall 'that general expressions, in every opinion, are to be taken with the case in which those expressions are used,' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision,' has special force in this instance."

Historically the writ of mandamus was devised to provide a remedy where no other remedy existed. Its purpose was to afford an adequate means of procuring justice in the proper field of its operation where there was an asserted legal right and no legal remedy for the enforcement of that right. The tendency is to enlarge and advance, rather than restrict and limit, the scope of the remedy of mandamus, in order to afford relief to which a party is entitled, in the absence of any other adequate and complete legal remedy. Mandamus is an extraordinary common-law remedy, and it is generally conceded that certain rules governing the issuance of a writ of mandamus are fundamental. Some of these have been restated in the statutes of Ohio.

Article IV, Section 6 of the Constitution of Ohio provides that the courts of appeals shall have original jurisdiction in mandamus; hence, Relator has the absolute right to invoke the powers of this Court. Pertinent sections of the Revised Code governing this remedy follow.

Section 2731.01 Mandamus is a writ issued in the name of the state to an inferior tribunal, corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Section 2731.03 The writ of mandamus may require an inferior tribunal to exercise its judgment or proceed to the discharge of its functions, but it cannot control judicial discretion.

Section 2731.05 The writ of mandamus must not be issued where there is a plain and adequate remedy in the ordinary course of law.

At the outset of this discussion, consideration will be given to the construction and application of the last two sections above. It should be observed that Relator is not asking this Court to control the judicial discretion of any public board or officer. In the instant case, only a perfunctory ministerial duty of a nondiscretionary nature is involved. This is not a case where ministerial officers have abused their discretion in refusing the permit requested. Relator makes no such claim. It is a case where the city itself, by the enactment of the prohibitory ordinances hereinbefore discussed, has absolutely and unequivocally barred itself and its officials *from acting upon* Relator's request for a permit. The city has wrongfully laid an embargo upon overhead lines carrying more than 33,000 volts, thereby shutting off, without any consideration whatever of its merits, any action upon Relator's application for a permit to construct its proposed 132,000 volt overhead line. In *Wehrmeister v. Carlman*, (1958) Ill. App. , 149 N. E. 2d 453, a writ of mandamus was granted for a building permit. The court said (p. 460):

"Ordinarily, the proper remedy for a party aggrieved by the wrongful refusal of a city official to grant him a

permit where the granting of such permit is made by ordinance a condition precedent to the doing of some act, is by a suit in mandamus to compel the issuance of such permit. And mandamus is a proper remedy to require the issuance of a building permit where the only objection thereto is made under the municipal zoning ordinance and where that ordinance is inapplicable to the property in question either because it is void as applied to the property or because the property or situation involved comes within an exception in the ordinance, since under those circumstances *the act of issuing the building permit becomes ministerial only and no discretion is involved.*" (Emphasis supplied.)

Ordinance No. 32 vests no discretion whatever in the municipal corporation or its officials whose duty it is to issue the permit. It tersely provides that Relator shall submit plans showing the work it proposes to do, "and receive a proper permit therefor;" and thereupon it shall have the right to proceed with its work. Obviously, the actual issuing of the permit is a routine and ministerial matter only. This is all the more apparent since the ordinance sets up no standards for the exercise of discretion by anybody. No reference need be made, therefore, to the cases cited by Respondents touching the Court's power to control the judicial discretion of any public board or officer of the city of Euclid, since the question is not involved in this case.

Respondents contend that mandamus is not the proper remedy here since Relator has a plain and adequate remedy in the ordinary course of law; in fact, they suggest that Relator has four remedies, namely, an action for specific performance; an action for damages for breach of contract; an action for mandatory injunction; and an action for declaratory judgment and ancillary relief. It is

not enough, of course, that some legal or equitable remedy, other than mandamus, might exist in a given case; it must also be an available and adequate remedy. Not one of the actions stated above satisfies this essential requirement. Respondents seem quite vague about the adequacy and availability of the first three classes of action; and it must be owned that their position, at times, appears somewhat inconsistent. With respect to their claim that Relator may maintain an action for specific performance, I presume they mean that a court of equity can compel the city of Euclid to issue the permit Relator has requested. I know of no case, and Respondents have cited none, which holds that a court of equity has jurisdiction and the power to make such an order. It is elementary that jurisdiction to decree the specific performance of agreements rests upon the ground of the inadequacy and incompleteness of the remedy. Manifestly Relator ca nake no such claim since it has an adequate remedy at law—an action in mandamus; and, strangely enough, Respondents themselves contend that Relator has an *additional adequate remedy at law* in that it may maintain an action for damages for the breach of its franchise contract. Respondents cite no authority for their novel theory and my own research has discovered none. *Pomeroy's Equity Jurisprudence* (5 ed. 1941), to the best of my knowledge, contains no statement which supports, or even tends to support, their theory. I regard it unsound. An action for specific performance is not an adequate remedy, nor is it available to Relator, and I so find.

An action for damages for breach of Relator's franchise contract is utterly inadequate as a substitute for the relief Relator seeks in this action for a writ of mandamus. Respondents contend that Relator would be entitled to a "monetary judgment in the amount of the difference be-

tween the cost of constructing the line overhead and the cost of constructing the line underground." This, of course, is not the only measure of damages. Obviously, there also would be substantial special damages, incapable of ascertainment, resulting proximately from the breach. But assuming that, after a protracted and costly trial of such action, Relator recovered a judgment of some $4,000,000 or more against the city of Euclid, what assurance has Relator that the judgment would, without further proceedings, be promptly paid? If not, how would Relator proceed to collect it, and how long would such proceedings take? Surely an action for damages cannot rationally be considered an available and adequate remedy in the ordinary course of law. Furthermore, it must not be overlooked that Relator is seeking a permit to construct and maintain its overhead line in perpetuity in order that it may more economically render additional and better service to its customers. The remedy that is sought is simply to make certain that the things promised by the city when it granted the franchise and upon which Relator relied, will be carried out. An action for damages would not accomplish this purpose and it affords no adequate substitute for Relator's legal right to compel the city and its officials to issue the permit it has requested, and I so find as a matter of fact and of law.

An action for a mandatory injunction is likewise inadequate and unavailable to Relator. Respondents do not make clear the kind of relief which might be sought in such an action. However, it is elementary that injunction and specific performance are interdependent remedies. The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel specific performance, and is governed by much the same rules as govern the right to specific performance. *Pomeroy's Equity Jurisprudence*, (5th ed. 1941) § 1341.

Like the action for specific performance, a petition seeking such relief in a court of equity would promptly be dismissed at the instance of Respondents' able counsel on the ground that the want of an adequate remedy at law is essential to relief in equity. Manifestly, Relator has that adequate remedy at law in the action for mandamus. In this connection, it seems appropriate here to cite *State, ex rel. Selected Properties, Inc., v. Gottfried*, (1955) 163 Ohio St. 469, 127 N. E. 2d 371. The relator sought a writ of mandamus to compel the respondent officials of the city of Parma to issue to the relator a requested variance permit and based its action upon a section of a zoning ordinance alleged to be unconstitutional. In the course of his opinion, Weygandt, C. J. said (p. 475):

> "* * * the controversy presents a *typical situation for the use of the remedy of a writ of mandamus*, which, under the common law as restated by Section 2371.01, Revised Code, commands the performance of an act specially enjoined by law as a duty resulting from an office, trust or station. *Injunction would not serve the purpose here. In contrast it is a remedy in equity, while mandamus is a remedy at law; and it is, of course, fundamental that equity may not be employed when there is an adequate remedy at law.* * * * An injunction is employed to prevent further injury, while the purpose of mandamus is to redress past grievances. Clearly the latter is called for here." (Emphasis supplied.)

In *Atkins Realty Co. v. Broxterman*, (1928) (Hamilton County Com. Pleas) 23 O. L. R. 59, it was held that mandamus, and not mandatory injunction, is the proper remedy to compel officers of a municipality to issue a building permit. In *Fischer v. Damm*, (1930) 36 Ohio App. 515, 173 N. E. 499, it was held that mandamus is an exclusive remedy, justifying denial of mandatory injunction

to compel a public officer to perform a duty enjoined by law.

Respondents urge also that Relator has a remedy in declaratory judgment. In their brief, they contend that Relator has no right to invoke the remedy of mandamus since "the Declaratory Judgment Act affords to Relator a method to obtain a construction of such ordinance [No. 32], contract or franchise and for the declaration by the court of its rights thereunder and upon obtaining such declaration to enforce the performance of the duties so declared." It is difficult to understand how Respondents can seriously make this claim. If their argument be sound, declaratory judgment would be available in every case and would supplant completely the time-honored remedy of mandamus. The Court of Appeals do not have original jurisdiction to entertain an action for a declaratory judgment (*Dyar v. Bingham*, (1955) 100 Ohio App. 304, 136 N. E. 2d 444); in contrast, however, the Constitution of Ohio expressly grants to the Courts of Appeals original jurisdiction in actions of mandamus. No statute can take away or curtail the right to maintain such action (*State v. Baldwin*, (1908) 77 Ohio St. 532, 538) and certainly the General Assembly will not be presumed to have attempted to do so by indirection. A host of decisions of the Supreme Court and the Courts of Appeals of Ohio, and especially of this Court, besides countless decisions of the courts of other states, wherein the writ of mandamus was granted in cases similar in principle to the case here, conclusively demonstrate the fallacy of Respondents' argument.

The right to maintain an action for declaratory judgment is not absolute since, in the exercise of its discretion, the court may refuse a declaratory judgment when it deems that rights may be fully protected through other available remedies. *Schaefer v. First National Bank*,

(1938) 134 Ohio St. 511, 518, 18 N. E. 2d 263. Although the general rule is that the jurisdiction of the court in declaratory judgment actions is not limited to cases in which no other remedy is available, the Supreme Court of Ohio has qualified the rule by holding that "proceedings for a declaratory judgment will not be entertained where another *equally serviceable* remedy has been provided for the character of the case in hand." *Radaszewski v. Keating*, (1943) 141 Ohio St. 489, 498, 49 N. E. 2d 167. It is manifest that in the situation presented in the instant case, there *is* "another equally serviceable remedy"—the remedy of mandamus.

Actions for declaratory judgment are usually designed for mere declarations of rights; to remove uncertainty and insecurity from legal relations, and thus to clarify, quiet and stabilized them before irretrievable acts have been undertaken; and to enable interdependent rights involving numerous parties to be settled in a single proceeding. The main characteristic of a declaratory judgment which distinguishes it from other judgments is the fact that it conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree. 16 *O. Jur.* 2d Declaratory Judgments § 2. Moreover, a court may refuse to render a declaratory judgment when no uncertainty or controversy would be terminated thereby. *Walker v. Walker*, (1936) 132 Ohio St. 137, 5 N. E. 2d 405. However, Respondents assert that once the court has rendered the declaratory judgment or decree, further relief based thereon may be granted. Section 2721.09, R. C., provides that the application therefor "shall be by petition to a court having jurisdiction to grant the relief." Apparently it is upon this section that Respondents base their contention that declaratory judgment is an adequate remedy. But it should be observed that this section is merely

a license to bring a mandamus action based upon a declaratory judgment. Counsel for Relator point out that "far from being an adequate remedy, it is no remedy at all. After a declaration of rights, the appropriate remedy for enforcing the right must be sought. Thus, declaratory judgment is no remedy at all." A case which is strikingly similar to the case at bar illustrates this point. In *State, ex rel. Scandrett v. Nelson*, (1942) 240 Wis. 438, 3 N. W. 2d 765, it appears that an action in mandamus was brought to compel the commissioner of buildings to issue to relator a permit to build an addition to a warehouse. The permit had been refused on the ground that the property was zoned for residential use. The court found that the zoning provisions were unreasonable and ordered the permit to issue according to the prayer of the petition. With reference to the contention that the writ should be denied because the declaratory judgment statutes offered an adequate remedy, the court said (p. 441):

> "Neither can the right of the relator to seek relief herein by a peremptory writ of *mandamus* be denied on the theory that they would have an adequate remedy in an action for declaratory judgment. Such relief at best would still be inadequate, and there would be absent the additional relief obtainable only by a peremptory writ of *mandamus* to compel the issuance of the permit."

The courts of California have held that the fact that an action for declaratory judgment or for injunction might lie does not prevent the use of an action for mandamus. *County of Los Angeles v. State Department of Public Health et al.*, (1958) Cal. App. , 322 P. 2d 968; *Brock v. Superior Court*, (1952) 109 Cal. App. 2d 594, 603, 241 P. 2d 283. In Georgia, it has been held that the office of a declaratory judgment is to declare rights, not to grant

coercive relief. *City of Nashville v. Snow*, (1948) 204 Ga. 371, 49 S. E. 2d 808; *Clein v. Kaplan*, (1946) 201 Ga. 396, 40 S. E. 2d 133. No useful purpose will be served by continuing this discussion. It is manifest that Relator seeks here the issuance of a permit—not a mere declaration of its rights. The Constitution of Ohio gives it the right to bring its action in this Court. The statutes of Ohio permit it to seek relief by an action in mandamus—an action especially designed to secure the relief it seeks. No other adequate remedy at law or in equity is available to it. I find, therefore, as a matter of fact and of law, that Relator is lawfully entitled to use the appropriate medium *mandamus* for the assertion and enforcement in this Court of its legal rights.

It is a fundamental principle of law that a writ of mandamus will be issued only where the relator establishes a clear right thereto. Respondents have cited a number of cases which reaffirm this indisputable principle. But, aside from this, the decisions are of little assistance in solving the particular problem in the instant case, since, in general, the facts to which the rule was applied bear no resemblance to the facts in the case at bar.

Does the evidence, oral and documentary, show that Relator has a "clear right" to a writ of mandamus? In my judgment, it does. Under the facts and circumstances of this case, the act sought to be enforced is one of *absolute obligation* and, as I have previously found as a matter of fact and of law, no other adequate and available remedy exists to enforce the performance of that act. By Ordinance No. 32, the city of Euclid has granted Relator the right to use the streets of the city for its corporate purposes, and has unequivocally obligated itself to issue the permit requested by Relator, upon compliance by it with the provisions of that ordinance. That duty—the precise

duty the city itself created by legislation and which Relator here seeks to enforce—is one which, by virtue of Section 2731.01, R. C., may be enforced *against the city* in its corporate capacity as well as against its officials who, by virtue of their office, are empowered to act for it in fulfilling that duty. In the following cases, the writ was issued against a township, village, or city as well as against certain officials thereof. *State, ex rel. Turner v. Village of Breman et al.*, (1927) 117 Ohio St. 186, 158 N. E. 6; *State, ex rel. Geletka v. City of Campbell et al.*, (1952) Ohio App. , 113 N. E. 2d 601, app. dismissed, 157 Ohio St. 553, 106 N. E. 2d 83; *State, ex rel. Thompson, Hine & Flory v. Council of City of Bedford et al.*, (1930) 37 Ohio App. 265, 174 N. E. 601, aff'd 123 Ohio St. 413, 175 N. E. 607; *State, ex rel. Cadwallader v. Village of Antwerp*, (1957) 104 Ohio App. 109, 146 N. E. 2d 877; *Castle National, Inc. v. Village of Wickliffe et al.*, (1947) Ohio App. , 80 N. E. 2d 200. The courts of other states recognize this principle. *Blackman Health Resort v. City of Atlanta*, (1921) 151 Ga. 507, 107 S. E. 525; *Johnson Construction Co. v. Township of White Lake*, (1958) Mich. , 88 N. W. 2d 426; *Senefsky v. City of Huntington Woods*, (1943) 307 Mich. 728, 12 N. W. 2d 390; *State, ex rel. National Subway Co. v. City of St. Louis et al.*, (1898) 145 Mo. 551; *Fischer v. Township of Beaminster*, (1950) 5 N. J. 534, 76 A. 2d 673; *Leeds v. Atlantic City*, (1889) 52 N. J. L. 332; *Consolidated Edison Co. v. Village of Briarcliff Manor*, (1955) 208 Misc. 295, 144 N. Y. S. 2d 379; *Carter v. City of Bluefield*, (1949) 132 W. Va. 881, 54 S. E. 2d 747.

Earlier in this report, it was determined that all of the preliminaries preceding the execution of the function sought to be compelled have been completed so that nothing is left for the city of Euclid and its officials to do except

the simple ministerial act of issuing the permit applied for. In the instant case, Ordinance No. 32 was the only valid law in force at the time the application was made, and under that ordinance it was the absolute and nondiscretionary duty of the city of Euclid to issue, or cause to be issued, the permit applied for by Relator. As hereinbefore determined, subsequent legislation cannot deprive Relator of the rights acquired by virtue of Ordinance No. 32. Additional authorities supporting this proposition are: *State, ex rel., Fairmount Center Co. v. Arnold*, (1941) 138 Ohio St. 259, 34 N. E. 2d 77; *State, ex rel., Ice & Fuel Co. v. Kreuzweiser*, (1929) 120 Ohio St. 352, 166 N. E. 228; *State, ex. rel., Gaede v. Guion*, 117 Ohio St. 327, 158 N. E. 748; *Hauser v. State, ex rel. Erdman*, (1925) 113 Ohio St. 662, 150 N. E. 42; *State, ex rel. Castle National, Inc. v. Village of Wickliffe*, (1947) Ohio App. , 80 N. E. 2d 200. As previously reported in detail, the evidence shows that Relator's application, plans, and specifications were in proper order and complied fully with all of the conditions and requirements set forth in the franchise ordinance (No. 32) and that Relator would have been entitled to the permit except for the subsequent prohibitory provisions of Ordinance No. 288-1956 and Ordinance No. 78-1957. In its formal Resolution No. 147-1957 setting forth its reasons for refusing to issue the permit, the council of the city of Euclid made it plain that the city's refusal was based on the fact that Relator's proposed overhead line did not meet the requirements and conditions set forth in those ordinances. However, as determined earlier herein, Relator's rights under Ordinance No. 32 are not affected by Ordinance No. 288-1956, as amended by Ordinance No. 78-1957, or by the Zoning Ordinance No. 2812. The first two ordinances are violative of Relator's constitutional rights and are void and of no effect. The zoning ordinance, in-

sofar as it is applied to Relator under the circumstances shown to exist in this case, also is violative of Relator's constitutional rights and is void and of no effect.

It is manifest, therefore, that Relator's right to the permit applied for must be determined solely by the provisions of Ordinance No. 32. Since the evidence shows that Relator has fully complied therewith, I find as a matter of fact and of law that Relator has established a clear right to the writ of mandamus prayed for.

The only remaining question is with respect to the remedy. Tersely stated, it is: To whom shall the writ issue? Relator has established a clear right to the permit for which it has applied and in my judgment there is no difficulty in ascertaining those against whom the writ should issue. We are dealing here primarily with a *right* and I am confident that this Court is more concerned with the enforcement of rights than with the strict and inflexible observance of technical, and sometimes irrational, rules relating to the mechanics of the remedy. This Court has ample power to shape its writ to fit the exigencies of a case as justice may require. Good examples of the application of this broad and wholesome principle are: *State, ex rel. Turner v. Bremen,* (1927) 117 Ohio St. 186, 158 N. E. 6; *State, ex rel. Thompson, Hine & Flory v. Council of City of Bedford et al.,* (1930) 37 Ohio App. 265, 174 N. E. 601, aff'd 123 Ohio St. 413, 175 N. E. 607. See also *State, ex rel. Blackwell v. City Council of Cincinnati,* (1957) 166 Ohio St. 301, 143 N. E. 2d 127. The cases cited by Repondents deal with the question whether a clear right to the relief sought existed rather than with the problem of who shall be designated in the writ as the person who must make possible the fulfillment of that right. It is manifest that if it is established that no clear right to the remedy exists, that ends the matter and a court, ordinarily, need

proceed no further. As a matter of common sense, it would be useless to attempt to enforce a remedy, when there is no right. It seems to me that the cases cited by Respondents hold this and nothing more. In the instant case, however, Relator has, beyond any peradventure of a doubt, established a clear right to the relief sought. But Respondents seem to say to Relator: Even though you have a clear right to the permit you seek, it is up to you to find and tag the man who can lawfully issue it. In their brief, however, they cite no case in which the enforcement of a clear right has been denied for lack of naming an appropriate officer in the original ordinance. On the contrary, it seems to me that the cases cited by them plainly indicate that mandamus will lie to enforce a duty necessarily implied from those expressly imposed. Certainly this Court is not so helpless as to deny the remedy because, without, perhaps, the assistance of Respondents, it may seem to be difficult to "tag" the particular legal entity or person who is to perform the perfunctory ministerial and nondiscretionary act essential to the realization of Relator's clearly established right.

A certain amount of confusion has been created by the council of the city of Euclid by reason of its naming certain persons who should issue the permit under various circumstances. This confusion, I believe, may easily be dispelled. Consideration, therefore, will first be given to the recent ordinances of the city of Euclid which concern Relator's right to construct its proposed overhead line within the city. Ordinance No. 78-1957 provides that a line carrying more than 33,000 volts must be installed underground and that a permit therefor must first be obtained from the council. Obviously, that ordinance, aside from its unconstitutionality, has no bearing upon the question now under discussion, since Relator seeks to con-

struct an overhead line, not an underground one. In contrast to that ordinance, Ordinance No. 288-1956 does not prohibit overhead lines as such. Section 2 of Ordinance 288-1956 provides that the Administrative Director of the city is "hereby authorized" to issue a permit where the voltage carried is solely for the use of customers within the city of Euclid; but if the voltage exceeds 33,000 volts, "the permit shall be authorized by the Council," in a form approved by the Director of Law. This ordinance, as previously determined by me, is violative of Relator's constitutional rights and is void and of no effect. Furthermore, in my judgment, it is void in its entirety including the provisions for the issuance of the permit in the manner prescribed therein. The provisions relating to the mechanics of the issuance of the permit are so inextricably bound up with the unlawful provisions of the ordinance that when the unlawful provisions fall, the provisions relative to the mechanics of the issuance of the permit necessarily fall with them. They are one and inseparable. It seems to me that all of the provisions are so united in subject matter, so dependent upon each other, and so tightly linked together and intervolved in meaning and purpose that it cannot be presumed that the council would have passed the one without the other. Counsel on both sides appear to oppose this construction but I can see it no other way.

Because Ordinance No. 288-1956 and Ordinance No. 78-1957 have been completely eliminated from this discussion, consideration must be given to the original franchise ordinance (No. 32). Respondents contend that since no particular official of the city is expressly authorized by the ordinance to issue the permit, no person can be compelled by this Court to issue it. In other words, they argue that although Relator may have a clear right to the permit applied for, the ordinance affords Relator no means

to obtain it if it should be unlawfully withheld. If that be true, then Relator's franchise is an illusory one—a mere sham. There is a principle of law that, in construing a legislative enactment, a construction which results in a ridiculous or absurd situation must be avoided if reasonably possible. *State, ex rel., Haines v. Rhodes*, (1958) 168 Ohio St. 165, N. E. 2d . Hence, it is the duty of the courts, unless restrained by the clear language thereof, so to construe the enactment as to avoid such a result. *State, ex rel., Cooper v. Savord, Judge*, (1950) 153 Ohio St. 367, 92 N. E. 2d 390. However, Respondents contend that this Court cannot create a legal duty where one does not exist by law; and, in support thereof, they cite State, *ex rel., Stanley v. Cook*, (1946) 146 Ohio St. 348, 66 N. E. 2d 207, and *Davis v. State, ex rel., Pecsok*, (1936) 130 Ohio St. 411, 200 N. E. 181. Relator does not claim that this Court can create a legal duty. That question is not in issue here. The duty sought to be enforced here already exists; the city of Euclid itself created it by Ordinance No. 32. All that Relator asks is that this Court compel the city to carry out that duty. It has heretofore been determined by me that a mandatory duty rested upon the city to issue the permit when Relator complied with all the terms and conditions of Ordinance No. 32. Obviously, the city, as a corporation, cannot act for itself. A municipal corporation acts only through its council and its executive and administrative officers. Whom, then, should this Court order to act for and on behalf of the city in performing the ministerial act of issuing the permit to which Relator is clearly entitled? That can be determined by the Charter of the city, by statute, by general law, and sometimes, by long continued administrative construction of an ordinance.

The Charter of the city of Euclid divides all governmental functions into three classes of powers, viz., the

legislative, the executive, and the judicial. Until such time as a municipal court shall have been established for the city, the Mayor has all the judicial powers granted to Mayors of cities by the Laws of Ohio.

Article II, Section 1 provides in part:

> Except as reserved to the people by this Charter, the legislative power of the City shall be vested in a Council of nine members * * *.

Section 731.05, Revised Code, provides in part:

> The powers of the legislative authority of a city shall be legislative only, it shall perform no administrative duties * * *.

Of course, as counsel for Relator properly point out, the city of Euclid is a charter city and the division of governmental authority is within the city's power of local self-government. Nevertheless, the statutory provisions are important as indicating, perhaps, the sense in which the language of the Charter is used.

Article IV of the Charter provides in part:

> Section 1. The chief executive power shall be vested in a Mayor, * * *.
>
> Section 2.D. The Mayor shall exercise supervision and control of all the executive departments and divisions of the City. He shall * * * see that all laws, ordinances and resolutions are faithfully obeyed and enforced. * * *.

Article V of the Charter provides in part:

> Section 1. The City shall have a Department of General Administration, a Department of Service, a Department of Finance, and a Department of Law. The Mayor shall appoint as the head of each department, a director, who shall exercise supervision and control of his department and who shall serve at the pleasure of the Mayor. * * *.

> Section 2. The Administrative Director shall be head of the Department of General Administration * * *

It is common knowledge that in government the legislative branch makes the laws, the judicial branch interprets them, and the executive branch carries them into effect. It is quite evident that under the Charter of the city of Euclid all executive and administrative power is given to the Mayor and none is reserved to the Council. Therefore, it cannot be given to or exercised by the council. The Charter is an authority superior to that of the council. It limits, governs, and controls the Council very much the same as the Constitution of Ohio limits, governs, and controls the General Assembly. *Bauman v. State ex rel., Underwood*, (1930) 122 Ohio St. 269, 171 N. E. 336.

Ordinance No. 32 has been in effect for more than 32 years. Under and by virtue thereof numerous permits for the use of the streets have been granted to Relator by the Village of Euclid and by the City of Euclid throughout that time. As far as the record shows, never before, until this action was filed, has the authority of the administrative officer of the village or city government to issue the permits been questioned. During the existence of the village government, applications were filed with and issued by the Village Clerk. Counsel for Respondents, during the trial of this case, frankly admitted that it was the duty of the Village Clerk to issue the permit. When the village became a charter city, the executive and administrative functions of the city's government devolved upon the Mayor and the Administrative Director. Ordinance No. 32 enjoins upon the city of Euclid the duty of issuing to Relator the permit applied for and those officers are expressly authorized by the Charter to carry out the city's duty with respect thereto. Furthermore, the Charter of

the city of Euclid expressly commands the Mayor to "see that all laws, ordinances and resolutions are faithfully obeyed and enforced." It seems to me that this means *all* ordinances, whether they operate to the advantage of the city or not. Since the city has obligated itself to issue the permit upon Relator's compliance with the requirements of Ordinance No. 32, the Mayor is duty bound by the Charter to see that this ordinance is strictly obeyed. Therefore, in my judgment, it is just as much the Mayor's duty to see that the city's administrative officials, including himself, obey that ordinance as it is that he see that the Relator does. I am persuaded that under the Charter it is the Mayor's inexorable duty to see that the proper officers of the city issue to Relator the permit to which it is justly entitled by virtue of Ordinance 32.

In the instant case, Relator filed its application for the permit with M. A. Spino, the Administrative Director of the city. The evidence shows that Relator's applications for permits to install transmission lines, to relocate its lines or poles, or for other purposes have regularly been made to M. A. Spino, as Administrative Director. Relator introduced in evidence some of the original permits (Relator's Exhibits 54-1 to 54-9) issued to Relator. These were issued during the period between February 13, 1957 and September 10, 1957. In the lower left hand corner of such permits appear these words and signature:

"The permission requested above
is hereby granted.
City of Euclid
By M. A. Spino Administrative Director"

It should be observed that it is the City of Euclid which issues the permit. The simple ministerial act of signing it is that of the Administrative Director who, in turn, acts

under the supervision and control of the Mayor. This is purely a routine and ministerial act and, since no discretion is involved, it is well-established that mandamus may be used to compel such officer to perform the duties incident to the office he holds. Respondents argue that the Charter does not specify or define in detail the duties of the Administrative Director. None ever does. It would be impractical to attempt to describe in minute detail the various duties which, as a matter of custom and daily practice, are performed by every officer in the city government. No sensible person undertaking to draft a Charter would dare, by so doing, to risk the application of the well-known maxim *expressio unius est exclusio alterius*. Furthermore, there is no need to. The Charter expressly provides that the duties of the Administrative Director are those assigned to him by the Mayor; and he acts under the Mayor's supervision and control at all times. It seems to me that it must be conclusively presumed that M. A. Spino has been authorized by the Mayor to perform the ministerial duty of signing the permit in behalf of the city which has bound itself to issue it. According to the records of Relator which go back twelve years—the city's records go back only seven—permits have always been signed on behalf of the city by M. A. Spino. Certainly the Mayor, and undoubtedly the council also, has been aware of this fact, and it is inconceivable that Mr. Spino would have done so without the Mayor's authorization. It must be remembered that throughout that entire period it was always within the power of the Mayor to have prohibited M. A. Spino from performing that routine and nondiscretionary act. It seems to me, therefore, that the Mayor's failure to do so is convincing proof that M. A. Spino is fully authorized and empowered to perform the ministerial act of issuing the

permit for which Relator has applied and to which it is entitled.

In conclusion, I recommend to this Court that a writ issue to the City of Euclid; Kenneth J. Sims, Mayor of the City of Euclid; and M. A. Spino, Administrative Director of the City of Euclid, ordering and commanding them to forthwith issue to Relator the permit requested by it as prayed for in its petition. I also recommend that Relator may have its costs.

Respectfully submitted,

CLINTON DEWITT,
Special Master Commissioner.

ORDER OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

December 1, 1958: To Court: This cause came on to be heard upon the pleadings, the transcript of the testimony before the Special Master Commissioner, and the Report of the Special Master Commissioner, the motion of Respondents to set aside the Report of the Special Master Commissioner and dismiss the petition, upon Respondents' exceptions to the Report of the Special Master Commissioner, and the motion of Relator to confirm and adopt the Report of the Special Master Commissioner, and was argued by counsel, and the Court, being fully advised in the premises and having fully reviewed the testimony and Report of the Special Master Commissioner, adopts the Report of the Special Master Commissioner filed herein as its findings of fact and conclusions of law; and

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the Report of the Special Master Commissioner filed herein on July 21, 1958, be and the same hereby is confirmed and adopted;

2. That Respondents' exceptions to the said Report of the Special Master Commissioner be and the same hereby are overruled;

3. That Respondents' motion to set aside such Report of the Special Master Commissioner and to dismiss the petition be and they hereby are overruled.

4. That a writ of mandamus issue against the Respondent, City of Euclid, Ohio, the Respondent, Kenneth J. Sims, as Mayor of the City of Euclid, Ohio, and the Respondent, Michael A. Spino, as Administrative Director of the City of Euclid, Ohio, commanding them, and each of them, to issue permits to the Relator, The Cleveland Electric Illuminating Company, as prayed for in the petition;

5. That, except for the fee of the Special Master Commissioner which shall be paid one-half by the Relator and one-half by the Respondents as stipulated, Relator recover of Respondent, City of Euclid, Ohio, its costs, for which judgment is hereby rendered.

Respondents except.

Received for Filing December 1, 1958. Emil J. Masgay, Clerk of Courts. By A. M. Harrington, Deputy. /s/ Lee E. Skeel, Presiding Judge, and Joy Seth Hurd, Judge. (Journal 22, Page 319.)

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

(July 15, 1959.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein.

It is further ordered and adjudged that appellants recover from appellee their costs expended in this Court and in the Court of Appeals taxed at $

ORDERED, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this judgment into Execution. (Journal 43, Page 187.)

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 740.

THE STATE OF OHIO, *ex rel.* THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Relator-Appellant,

vs.

CITY OF EUCLID, OHIO,

and

M. A. SPINO,

Administrative Director of the City of Euclid,

and

KENNETH J. SIMS,

Mayor of the City of Euclid,

Respondents-Appellees.

MOTION OF RESPONDENTS-APPELLEES TO DISMISS APPEAL.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 740.

THE STATE OF OHIO, *ex rel.*, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Relator-Appellant;

vs.

CITY OF EUCLID, OHIO,

and

M. A. SPINO,

Administrative Director of the City of Euclid,

and

KENNETH J. SIMS,

Mayor of the City of Euclid,

Respondents-Appellees.

MOTION OF RESPONDENTS-APPELLEES TO DISMISS APPEAL.

Now come the Respondents-Appellees and respectfully move to dismiss the appeal herein upon the following grounds:

1. The appeal does not present a substantial federal question; and
2. The judgment below rests on an adequate non-federal basis.

PRELIMINARY STATEMENT.

This action originated in the Court of Appeals for the Eighth Appellate District of Ohio (Cuyahoga County) by the filing of a Petition therein, in which The Cleveland Electric Illuminating Company, the Appellant, was desig-

nated as the Relator and thirteen (13) public officers of the City of Euclid were named as Respondents. The Petition prayed for a writ of mandamus commanding each of such thirteen (13) Respondents to issue to the Appellant a permit for the construction of an electric transmission line to carry electric energy at a voltage of 132,000 volts over and across six (6) named streets in the City of Euclid, Ohio.

The Respondents named were the City of Euclid, all of the members of the Council, the Mayor, the Administrative Director and the Law Director.

The officers named refused to issue the permit because there was no ordinance empowering them to issue a permit to cross streets with an overhead transmission line carrying such high voltage current. There was an ordinance provision for underground construction. The Appellant did not elect to apply for a permit for underground construction, but itself determined that the high voltage line was to be constructed overhead, over the six (6) streets.

The Answers of the administrative officers pleaded that there was no ordinance provision whereby they were empowered to issue such permit as prayed for; that appropriate plans showing the work proposed to be done had not been filed; that under the provisions of the City Charter, all of the legislative power of the City was vested in its Council; that the City of Euclid was exercising its powers of local self-government as provided by Sec. 3, Art. XVIII of the Constitution of the State of Ohio; that the City was exercising its police power as granted by said constitutional provision; that the proposed 132,000 volt tower transmission line would endanger the safety of inhabitants of the City and users of the streets named; that such proposed line, if constructed, would increase the hazard of fire, would endanger lives and property, would reduce real estate values, would interfere with radio and

television reception and that any refusal of permission to construct such high voltage transmission line over dedicated streets of the City bore relation to the public peace, safety, health and welfare of inhabitants of the City, and would generally interfere with the comfort and prosperity of the inhabitants of the City.

The Court of Appeals appointed a special master commissioner to take evidence in the case. There were hearings extending over a period of six (6) weeks. Thereafter, the commissioner filed his report of the evidence and his recommendations as to the law of the case. The Court of Appeals directed that a writ issue only against the City of Euclid, its Mayor and its Administrative Director. The Petition was dismissed as to the other named Respondents.

An appeal as of right was made by these Respondents, the Appellees herein, to the Supreme Court of Ohio. The case was briefed and came on for oral argument on the merits on April 29, 1959. On July 15, 1959 the Court announced its decision. The Supreme Court reversed the judgment of the Court of Appeals. Within the rule, the Appellant filed an application for rehearing. The application was allowed and extensive briefs were filed covering the grounds urged in the application for rehearing. On October 6, 1959 the case was re-argued and on November 4, 1959 the Court announced its decision that upon reconsideration of the case, formerly reported in 169 O. S. 476, the Court adhered to its former judgment.

STATUTES INVOLVED.

Appellant sets forth, commencing at page 5 of the Jurisdictional Statement, certain Euclid ordinances claimed to be involved in this action. Omitted is an amendment to Ordinance No. 288-1956 of the City, which provides as follows:

Ordinance No. 265-1957.

By—Mayor Sims

"An emergency ordinance amending and supplementing Ordinance No. 288-1956 which made provision for permits for pole lines and underground work.

* * * * *

"SECTION 1: That Ordinance No. 288-1956, passed December 3, 1956, be and the same is hereby amended and supplemented by adding the following new section to be known as Section 2.2, which shall read as follows:

'SECTION 2.2: PERMIT FOR UNDERGROUND CONSTRUCTION.

In addition to the method of installation described in Section 2.1, of this ordinance, the applicant for a permit to be issued by the Council may use any method of underground construction approved by the Public Utilities Commission of Ohio or the National Electric Code, with or without lead covered cable and to a depth underground approved by such authority.'"

* * * * *

In Ohio it is necessary that a municipality grant its consent to a company, organized for supplying electricity, to occupy streets within the municipality. By virtue of Sec. 4, Art. XVIII of the Ohio Constitution, the City of Euclid may construct, own and operate its own public utility to supply its inhabitants with electricity and "may contract with others" for such product or service. The Appellant claimed below that the Village of Euclid in 1906 entered into a contract with Appellant for providing services to inhabitants of the municipality under Ordinance No. 32 set forth, commencing at page 7 of the Jurisdictional Statement. The Petition was framed around such

ordinance and therein it was alleged that the City of Euclid had altered and abridged the contract set forth in such Ordinance No. 32 by adopting a general ordinance requiring permits. Such ordinance in fact carries out the agreement by the Appellant only to perform work, erect poles or wires and build conduits underground if and when a "proper permit" is first obtained after plans and specifications have been placed on file. Ordinance No. 32 provides that the grant therein is subject to certain conditions and limitations therein expressed, which may be summarized as follows:

1. All "*wires* used by" the Appellant "*shall be properly insulated, and* shall comply with all state regulations and ordinances to be passed by "this village" requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland.

2. As a condition precedent to the commencement of any work thereunder by the Appellant, the Appellant is required to submit to "the proper officers" of the village, "*plans, showing the work it proposes to do in the erection of poles, wires, appliances,* or in the building of conduits * * * and they shall be kept on file in the office of the village clerk." (The ordinance does not designate the "proper officers" to receive such permit application or to issue the permit. Such privilege and authority is thereby reserved to the Council.)

3. Such *grant* or consent *was* "subject to all general ordinances now or hereafter in force in said village."

4. No pole or mast could be erected without the consent of the property owner before whose premises such pole or mast is proposed to be erected.

5. The Appellant is required to protect and indemnify the village upon any and all claims for damages which might arise by reason of its exercise of the grant.

6. The location of each pole or mast is subject to the control and direction of the village council and whenever any pole should, in the opinion of the Council, be changed for the best interest of the village, it must be changed by Appellant.

7. Appellant is *required to obtain a permit* from the village for the work it proposes to do, *as shown by the plans so filed*, and thereupon it has the right to proceed with the work *in accordance with the plans and specifications placed on file by it or them*. (Emphasis added.)

The Answers of the Respondents set forth that the Appellant was proposing to string uninsulated wires over such streets contrary to the express provision of Ordinance No. 32, and further that the Appellant had not filed plans and specifications as required by the ordinance. The Answers also pointed up the obligation agreed to whereby the grant was "subject to all general ordinances now or hereafter in force in said village."

THE QUESTIONS PRESENTED.

Four (4) questions are enumerated as being presented by this appeal. The import of Questions 1 and 2 is that the writer of the Opinion in the case in the Supreme Court of Ohio makes statements which counsel challenge with respect to the constitutionality of the ordinances complained of. Although the Court is familiar with the practice and rules in the Supreme Court of Ohio, we, nevertheless, feel it necessary to set forth here the law of Ohio with respect to Opinions, believing it will be most helpful in resolving the questions presented in this appeal, for it

appears that the sole basis urged by counsel, whereby this appeal presents a federal question, is counsel's criticism and complaint regarding the Opinion of the Court.

In Ohio an Opinion does not constitute an order or judgment and forms no part of the record. *Squire, Supt. of Banks vs. Guardian Trust Co.*, 144 O. S. 266; *State ex rel. Sherwood vs. Hoffman, Judge*, 95 O. S. 144, 117 N. E. 10. A Court of record speaks only through its Journal. *State ex rel. Industrial Commission vs. Day*, 136 O. S. 477, 26 N. E. (2d) 1014. The Supreme Court of Ohio, in *Freeman vs. State*, 131 O. S. 85 (89), in its Opinion states that "while in many cases opinions may be desirable for the benefit of bench and bar," there is no constitutional provision requiring a written Opinion.

Sec. 2503.20, Ohio Revised Code, provides for a syllabus in each reported case to be approved by the majority of the Court. Rule VI of the Supreme Court of Ohio provides that in each cause a syllabus of the points decided by the Court shall be stated in writing by the judge assigned to prepare the Opinion, which shall be submitted to the judges concurring for revisal and shall be inserted in the official volume of reports, without alteration, unless otherwise ordered. This rule was originally adopted in January, 1958 and established the principle in Ohio that the syllabus of a Supreme Court decision states the law, or as may be differently expressed, the points decided in the case are found in the syllabus. *Wrede v. Richardson*, 77 O. S. 182. Thus, the Supreme Court of Ohio announces the law solely through the syllabus of the case and through per curiam opinions. *Thackery v. Helfrich*, 123 O. S. 334.

The Supreme Court of the United States has said that the syllabus of a case decided by the Supreme Court of Ohio constitutes the official Opinion of that Court.

Perkins v. Benquet Consolidated Mining Co., 342 U. S. 437. Matter outside the syllabus is not regarded as decision. *Haas v. State*, 103 O. S. 1, 132 N. E. 158. The syllabus is the only part of the Opinion requiring approval of judges concurring in the judgment. *State ex rel. Donahey v. Edmondson*, 89 O. S. 93, 105 N. E. 269. The judge writing the Opinion may discuss matters or give expression to views, but such are merely the personal opinion of the judge.

In case of conflict between syllabus and Opinion, the former governs. The syllabus constitutes a statement of the rule of law, but it is not to be substituted for the Court's order or judgment, from which must be determined the issues decided by the Court. *Burton, Inc. v. Durkee*, 162 O. S. 433, 123 N. E. (2d) 432. In the course of the Opinion it is stated:

> "The purpose and object of rule VI of this court is to distinguish the syllabus, as the point of agreement of all the judges concurring in the opinion, from other statements made in the course of the opinion. The rule does not substitute the syllabus for the court's judgment, from which must be determined the issues decided by the court.
>
> There can be no question that where a judgment becomes final in the course of litigation, it becomes res judicata or the law of the case as to all questions therein decided.
>
> * * * * *
>
> In the case of *Pollock v. Cohen*, 32 Ohio St., 514, Judge Ashburn in the course of the opinion said:
>
> 'It is well settled by authority, and is a doctrine sound in principle, that all questions which existed on the record, and could have been considered on the first petition in error, must ever afterward be treated as settled by the first adjudication of the reviewing court.

(439) 'The time should come, in the history of a cause, when litigation must end. If the failing party was allowed to prosecute a new petition in error, on the same record, whenever he imagined he had discovered a new ground of error not previously assigned, litigation would be interminable. Such a practice would violate well-settled principles of law and be against public policy.' See, also, annotation, 67 A. L. R., 1390 *et seq.*; 11 University of Cincinnati Law Review, 266 *et seq.*"

In the light of the foregoing, the Supreme Court of Ohio speaks through its Journal Entries. In this appeal, they do not disclose the Court refused to consider any of the propositions advanced by the questions presented in this appeal. What counsel quotes from the Opinion is the conclusion of the judge who wrote the Opinion. The law is stated in the syllabus of the case. There is nothing before this Court, not even a scintilla, which in any wise supports the charge that the Supreme Court of Ohio did not consider the entire record which was before it (and which has not been filed in this appeal) and did not consider every contention or proposition advanced by counsel for this Appellant in that Court.

At page 21 of the Jurisdictional Statement, Appellant's counsel sets forth what was urged in their application for rehearing before the Supreme Court of Ohio. They concede by such statement that the propositions advanced by Questions 1 and 2 were specifically set forth in their application for rehearing. The lower court then considered such propositions after Briefs were submitted and the case was re-argued and elected to adhere to its previous decision. Such statement is an admission that this litigant was afforded every opportunity to have presented by learned counsel any and every question to be answered by that Court.

The syllabus in the case appealed, reported in 169 O S. 476, reads:

> "1. A municipal corporation may prescribe reasonable regulations for the installing of electric power lines through or into its territorial limits and may withhold its consent for the installation of such power lines until such regulations are complied with. (Sections 715.27, 4933.13 and 4933.16, Revised Code, construed and applied.)
>
> 2. A municipal ordinance which provides that all electric power lines installed within or through the municipality's territorial limits and carrying greater voltage than 33 KV (33,000 volts) shall be installed underground is not an unreasonable regulation unrelated to the health, safety and welfare of the inhabitants of the municipality."

All of the members of the Court agreed to paragraph 1 of the syllabus while a majority agreed to paragraph 2.

ARGUMENT.

The Brief of counsel for the Appellant does not appear to be responsive to the questions Appellant presents by this appeal. It is not helpful in determining jurisdiction, and failing this it would appear that no valid legal argument is presented whereby this Court has jurisdiction.

Statements from the majority opinion of the Supreme Court of Ohio are taken out of context—even split sentences—and made to conclude that the Appellant, in the Supreme Court of Ohio, had been deprived of its property without due process of law. Counsel argues, as proof that the Supreme Court of Ohio did not decide the questions presented, that an examination of the Opinion of the Court so discloses. We have demonstrated that the Supreme Court of Ohio speaks through its Journal and that there is every legal presumption and intendment that such Court, like every other Court of Appellate jurisdiction, resolved all of the questions which were presented to it and that its decree is res adjudicata.

The Supreme Court of Ohio has jurisdiction under the Ohio Constitution to reverse the judgment of a Court of Appeals. Art. IV, Sec. 2 Ohio Const. The Ohio General Assembly has implemented such provision in Sec. 2505.28, Revised Code.

We have also shown that Appellant's application for rehearing in that Court was allowed and that every opportunity was afforded such counsel to present any new or different questions and propositions and to argue them. We do not believe at this date there could be any substance to the charge that such Court did not consider so-called findings of fact or law in the rendition of its judgment. If there could be any substance, it could only be proven by the judges themselves. Certainly the record in

the case can not be interpreted as lending any support whatsoever to such unfounded charges.

1. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In support of the proposition that the appeal does present a substantial federal question, Appellant contends that the Supreme Court of Ohio refused to review the record and upset the findings of fact or law of the lower Court when it reversed. As we understand the argument, it is this—Appellant has been denied due process because the Supreme Court reversed and, in doing so, declined to consider the findings. To this, the answer is clear and unmistakable that in reversing and rendering a final judgment, such Court considered the entire record before it, which included the so-called findings. To state that the Court did not consider the findings is to assert something which is incapable of proof. That is precisely why in Ohio when a judgment becomes final in the course of litigation, all questions which were or could have been presented have been determined.

There is not, in this appeal, a substantial federal question because findings of fact are upset by the Supreme Court of Ohio. The entire record was before the Court and the Appellant cannot here contend that the judges did not read the record which included the so-called findings.

a. The ultimate question to be determined is whether a writ of mandamus shall be issued by the Court of Appeals for the Eighth Judicial District of Ohio, and that is a non-federal question.

The jurisdiction of such Court of Appeals permits the filing of an original action in such Court for a writ of mandamus. Art. IV, Sec. 6 of Ohio Constitution.

Sec. 2731.01, Revised Code of Ohio, defines "mandamus" as follows:

> "*Mandamus is a writ*, issued in the name of the state to an inferior tribunal, a corporation, board, or person, *commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.*" (Emphasis supplied.)

It is conclusive that the question of the issuance of the writ of mandamus which is the relief prayed for in the Petition must be determined upon local law. There must be a clear showing that there is a dereliction on the part of the Respondent officer to perform the act sought to be coerced and a clear duty to perform which is specially enjoined upon him by law. That must either be the Ohio Constitution, a state statute, a municipal charter or a municipal ordinance. *City of Mt. Vernon v. Berry*, 71 O. S. 428; *State ex rel. Howe Construction Co. v. Meyer*, 70 O. L. A. 246.

As alleged in its Petition, Appellant sets forth a controversy between it and the City of Euclid concerning its franchise contract which it received in 1906 under Ordinance No. 32. Such controversy is not an appropriate subject for a mandamus proceeding. As held in *City of Mt. Vernon v. Berry*, 71 O. S. 428, the third paragraph of the syllabus provides:

> "3. A controversy between the parties to a contract as to their respective rights under the contract cannot be determined in proceedings in mandamus."

To the same effect, this rule is stated in *State ex rel. Libby-Owens-Ford Glass Co. v. Industrial Commission*, 162 O. S. 302.

The Ohio rule with respect to this extraordinary writ of mandamus is not different from the federal rule which requires that it be sparingly exercised. It is an extraordi-

nary remedy available only in rare cases. Before the writ may issue, "a Relator must show a clear legal right to the relief sought as a condition precedent to the issuance of the writ." *State ex rel. Tarpy v. Board of Education*, 151 O. S. 81. The burden is upon the Relator to clearly establish such legal right to the writ. *State ex rel. Adams v. Rockwell*, 167 O. S. 15. If the evidence is cloudy, then it is the duty of the Court to deny the writ.

As was stated by the Court in *State ex rel. Gallinger v. Smith*, 71 O. S. 13, 18, and ofttimes reiterated by this Court:

> "It must now be accepted as a thoroughly well settled rule, that a peremptory writ of mandamus will not, in any case, be granted, unless *the right of the relator thereto be clear*, and *the act*, performance of which is desired, *be one of absolute obligation on the part of the officer* sought to be coerced; and before such writ will be allowed the relator must show not only *a clear legal right to have done the specific act desired*, but to *have it done by the particular person or officer sought to be coerced*; and a plain dereliction of duty must be established against such person or officer before the writ will be awarded." (Emphasis supplied.)

The judicial policy in Ohio of declining to issue writs of mandamus in controversies over public utility contracts is not unlike the jurisdictional rule followed by this Court in many appeals. It has steadfastly held to the proposition that the powers of municipalities and their exercise are subjects for local control by the State courts. Especially is this true within the area of litigation seeking interpretation of a public utility franchise or a contract, as in this case. *St. Paul Gas & Light Co. v. St. Paul*, 181 U. S. 142. There, the appeal involved the question of interpretation of a Charter and a subsequent resolution of the City requiring removal of equipment from the public streets.

The opinion states, p. 149:

"But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus reduce the proposition to its ultimate conception to demonstrate its error."

See also *Western Union Telegraph Co. v. Georgia*, 269 U. S. 67.

Appellant seeks by this action a writ of mandamus to compel issuance by the Council of the City of Euclid of a permit and, at the same time, requests the Court to strike down the only ordinance whereby the Council had provided for issuing permits. Ohio follows the federal rule whereby a Relator "cannot be heard to question the validity of the very power the exercise of which Relator, by this action, is asking the Court to compel." *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407; followed in *State ex rel. Synod of Ohio v. Joseph*, 139 O. S. 229.

b. In Ohio no public utility may occupy the streets of a municipality without the specific consent of such municipality.

This proposition is conceded by the Appellant, but for our purposes here we believe a history of the development of such rule would be helpful.

As pointed out, Sec. 4, Art. XVIII, of the Ohio Constitution empowers a municipality to either operate its own electric power facility or "contract with others." Thus, Appellant's relations with the City of Euclid must be the subject of contract. By virtue of the Home Rule provision in the Ohio Constitution, Sec. 3, Art. XVIII, the City of Euclid may exercise police power so long as it is

not in conflict with the general laws of the State of Ohio. In the majority opinion of this case, it is stated

"Section 715.27, Revised Code, provides:

'*Any municipal corporation may:*

'* * *

'(B) *Regulate the construction and repair of wires, poles, plants, and all equipment to be used for the generation and application of electricity* * * *.' (Emphasis added.)

Section 4933.13, Revised Code provides:

'A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. *With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity* for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires.' (Emphasis added.)

Section 4933.16, Revised Code, provides:

'No person or company shall place, string, construct, or maintain a line, wire, fixture, or appliance of any kind to conduct electricity for lighting, heating, or power purposes through a street, alley, lane, square, place, or land of a municipal corporation *without the consent of such municipal corporation.*

'This prohibition extends to all levels above or below the surface of such public ways, grounds, or places, as well as along their surfaces, but not to rights

received through and exercised under proceedings of a Probate Court prior to February 26, 1910.

'The penalty provided by Section 4933.99 of the Revised Code for a violation of this section is cumulative to other means of enforcing this section open to the municipal corporation, by way of injunction or otherwise, and is not exclusive.' (Emphasis added.)"

It is at once apparent that the Appellant must have the consent of the City of Euclid to construct any electric line, whether it be overhead or underground, and it cannot use the streets of the City without such express consent.

By Sec. 723.01, the Council of the City of Euclid is given special power as follows:

"Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance."

Sec. 711.07, Revised Code, provides that the dedication of a street in a municipal corporation shall constitute a conveyance of the fee of the land so designated so that the City of Euclid has a fee simple title to the streets which Appellant seeks to cross.

In the light of these constitutional and statutory provisions, Appellant would have no right or color to construct a pole line on a public street in Euclid without the consent of its legislative authority. The Opinion thus correctly states:

"The requirement of consent necessarily implies that the municipality may impose reasonable regu-

lations and conditions as to such construction as a condition to its consent. To interpret such requirement otherwise would be to hold that the requirement of consent is a mere empty thing of no meaning. This we cannot do, since it is a basic presumption in statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purpose."

Whether or not the Appellant can occupy any of the streets of the City of Euclid is a non-federal question. Such is the specific complaint made in the Petition. It was charged the Respondents were excluding the Appellant from occupying the City's streets by failure to issue a permit therefor to string uninsulated wires carrying 132,000 volts across such streets.

c. The cases cited do not support the proposition that a federal question is presented by this appeal.

The cases cited were also cited in the Supreme Court of Ohio. They do not lend authority to the proposition that this appeal presents a federal question.

Appellant relies heavily upon *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405 (1935). There, the suit was under the Uniform Declaratory Judgment Act of Tennessee. It was brought in a chancery court—not a mandamus action. The sole purpose of the suit was to determine the constitutionality of an order entered by the Commission, which was authorized by the Tennessee statute to require separation of grade crossings, if, in its discretion, such elimination was necessary to protect users of the highway. The Court specifically found that the Supreme Court of Tennessee had declined to consider certain special facts relied upon as showing the

order to be unreasonable. What were the special facts? That users of the highways (trucks) would compete with the railroad; the evidence showed a declining revenue for passenger traffic because buses were carrying passengers as well as pleasure cars; owners of buses and trucks were beneficiaries, since the occasion for separation of grade crossings had shifted from the danger of rail operations to intensify motor competition and the facilities so provided increased the speed of motor traffic. Thus, there was the question of whether the State's share of the cost of elimination raised by taxation was actually being used to the serious detriment of the railroad. Assessments for public improvement laid "on particular property owners are ordinarily constitutional only if based on benefits received by them." Mr. Justice Brandeis stated (431):

> "No case involving like conditions has been found in any of the lower federal courts; nor, excepting the case here under review, has any subject been found among the decisions of the highest courts of any state."

Clearly the facts in that case are different from this case. The statement above quoted still appears unchallenged. *Shepard's Service.* There appears no application of this case to an appeal to this Court from any other State decision. The other case relied upon is *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg,* 282 U. S. 162 (1930). A Nebraska law required a railroad to construct an underground cattle-pass across its right-of-way partly at the expense of the company and not as a safety measure, but for the convenience of any farmer owning land on both sides of the railroad. The Court found there was nothing in the record to suggest that the order was either requested or granted as a safety meas-

ure. The order was solely for the convenience of a private land owner. The case is clearly distinguishable.

Finally, we contend that the Supreme Court of Ohio did not refuse to consider the unconstitutionality of Ordinance No. 288-1956 of the City of Euclid, as amended, when applied to the particular evidence in the case. On rehearing, this specific question was presented to the Court, and it adhered to the former decision.

d. There is no substance in the proposition that the Supreme Court of Ohio denied Appellant a fair hearing.

As shown, the lower Court allowed an application of Appellant for rehearing. The same arguments were then presented by learned counsel, as set forth in Appellant's Brief in this Court. The same authorities were cited.

The syllabus of this case does not support the charge that the Supreme Court of Ohio took judicial notice of any fact. But if it did, error could not be charged. All Courts judicially notice such facts as they are bound to know and of such common knowledge as is known to the public generally. In a previous decision, *Arnold v. Ohio Gas & Electric Co.*, 28 O. App. 434 (Motion to Certify overruled June 19, 1929), paragraphs 3 and 4 of the syllabus read:

> "3. The court takes judicial notice of the fact that *uninsulated wires charged with electric currents of high voltage are dangerous to life.* (Emphasis supplied.)
>
> 4. Sec. 9195, General Code, requiring electric line and power wires maintained in public streets to be covered with waterproof insulation was passed for the protection of the public, and violation thereof is negligence per se."

In the area of constitutionality, a Court can only judge of the operations of a Statute "through facts of which it will take judicial notice." It cannot take testimony to determine the operations of the Statute and "thereby declare it unconstitutional." *State v. Nelson*, 52 O. S. 88 (1894); *Andrews v. Tax Commission*, 135 O. S. 374 (1939).

The cases cited by Appellant are not helpful, as they do not present the facts of this appeal. There is no instance in this case where the Supreme Court of Ohio refused or failed to consider all of the evidence in the record before it. Such Court did not hear the evidence. It reviewed the evidence offered below. No evidence was offered in the Supreme Court. Thus, it cannot here be charged with refusing something Appellant never offered. No infringement of rights by denial of fair hearing occurred in the Supreme Court. Appellant was allowed every consideration, including a rehearing.

Having reviewed the evidence in the record before it, and after Appellant through learned counsel was afforded opportunity to present the questions to be resolved, the Supreme Court of Ohio concluded: (1) that Appellant could only occupy streets in the City of Euclid under the City's consent and reasonable regulations, and (2) that a regulation requiring underground construction over streets of a 132,000 volt line was reasonable.

2. THE JUDGMENT OF THE SUPREME COURT OF OHIO RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

At page 29 of its Brief, Appellant states the following:

> "It is conceded by Relator-Appellant that if a transmission line is such a danger to the traveling public as to reasonably require its elimination, it may be

validly required to be placed underground if that will accomplish the objects sought."

For many years the State of Ohio required that all wires "shall be covered with a waterproof insulation." This wise provision was adopted on May 12, 1886. It remained in the statutory law until 1929, when the legislature amended then existing Sec. 9155 of the General Code of Ohio. During that entire period, no attack appears to have been made upon the constitutionality or validity of this provision. It was accepted by the electric companies as being a valid and constitutional requirement. The effect of the amendment was to revest in municipal governments the complete authority and jurisdiction over such wires under the Home Rule provision of the Ohio Constitution. Art. XVIII, Sec. 3.

Ordinance No. 32 which Appellant claims is its contract provides in Sec. 2 as follows:

> "Sec. 2: *All wires* used by The Cleveland Electric Illuminating Co. *shall be properly insulated*, and shall comply with all state regulations and ordinances to be passed by this Village requiring proper insulation and until such ordinances are passed, all of said wires shall comply, as regard to insulation, with the ordinances of the City of Cleveland. And this grant shall be subject to all general ordinances now or hereafter in force in said village." (Emphasis added.)

By the plain wording of Appellant's contract, it is required to "properly insulate" all of its wires which it may attempt to string over public streets. Its action in this case, however, is an attempt to string uninsulated wires across public streets. Under the permit ordinance of the City, it has the alternative then to go underground. The question of interpretation of Sec. 2 is non-federal.

Also, by the plain language of this section, the Appellant is "subject to all general ordinances now or hereafter in force." In the Petition, it is alleged that the ordinances complained of are general ordinances. The question of whether the Appellant is subject to such general ordinances is then a non-federal one.

Underground installation of electric wires and conduits, by exercise of the local police power, is not new. In 1884 the legislature of New York State adopted a Statute providing for the placing of electric wires and conduits, in cities exceeding 500,000 inhabitants, under the streets and subject to the control of local authorities. Laws of 1884, c. 534, Sec. 1. The validity of this Statute was questioned in several cases and at the level of the Court of Appeals of New York was sustained. *People ex rel. New York Electric Lines Co. v. Squire, etc.*, 107 N. Y. 593, 14 N. E. 820. In commenting on the Statute, it was stated in the Opinion:

> "These statutes were obviously intended to restrain and control, as far as practicable, the affairs alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the affairs which had grown to be almost, if not quite, intolerable to the public."

This same Court again had the question in *American Rapid Telegraph Co. v. Hess, et al.*, 125 N. Y. 641, 26 N. E. 919 (1891). There, the Plaintiff claimed it had an inviolable contract protected under the Federal Constitution, and neither the State nor the City could cause its poles and wires to be removed from the streets, excepting upon payment of compensation. The Court held the legislature

could not divest itself of its police power and its control "over the streets for the public welfare." The overhead wires being maintained "thus became a nuisance," the Opinion stating:

> "Who shall judge whether they uncommode the public use of the streets? It is unquestioned that they do, and the legislature has determined that fact, and, when the plaintiff maintained its wires and poles in the streets in such a manner as to uncommode the public use of the streets, the legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended."

Ohio is in harmony with the New York rule. It is stated in the first and second paragraphs of the syllabus in *City of Mt. Vernon v. Berman & Reed*, 100 O. S. 1:

> "1. The paramount purpose for which the streets of a municipality are dedicated and opened is to facilitate travel and transportation. They are held in trust for the benefit of the public and are required to be kept open and free from nuisance.
>
> 2. Rights in streets or highways granted to public service corporations are at all times held in subordination to the superior public rights."

In Pennsylvania, the rule is stated in appeal of *Bell Telephone Co. of Pennsylvania*, 138 Pa. Supp. 527, 10 A (2d) 817 (1940). There, the Court held that the Pennsylvania legislature was proceeding within its lawful exercise of police power in requiring both telephone and electric wires to be placed underground in conduit. The telephone company contested the validity of an ordinance of the Village of Eldred, with a population of 1,128, in requiring all wires on its main street to be placed underground. In hold-

ing the ordinance constitutional and reasonable, the Court stated, it:

> "would not substitute their judgment for that of the body to whom the exercise of the discretion is committed."

It discussed the question of increased cost initially to the utility, and concluded:

> "The argument also ignores the fact that the legislature has deemed it wise that boroughs should, at least in congested areas, have the privilege of requiring utilities to place their wires underground. The legislature having so determined, it only becomes a question of arranging the rates so that a proper revenue will be received by the utility. In so acting, the legislature was proceeding with its police powers."

CONCLUSION.

This appeal does not, as the portions of the record before this Court show, present any substantial federal question. The question which was determined was whether a writ of mandamus could issue from the Court of Appeals for the Eighth Judicial District of Ohio. The Supreme Court of Ohio determined the Petition for such extraordinary writ should be denied. Such judgment is purely one of local law.

The judgment of the Supreme Court of Ohio rests on an adequate non-federal basis. Appellant sought a permit for a 132,000 volt tower transmission line, with uninsulated wires across public streets in Euclid, Ohio. The statutory law of Ohio requires consent of the legislative authority. Under its Home Rule powers, Euclid has the sole control over its streets. It may refuse consent to string uninsulated wires.

The Appellant's franchise contract was "subject to all general ordinances now or hereafter in force." It con-

cedes the ordinance requiring underground installation of uninsulated wires is a general ordinance. It follows that Appellant must perform and be bound by the provisions of its contract whereby all wires strung overhead shall be properly insulated.

Finally, there is the long line of cases where this Court has declined jurisdiction of controversies over interpretation of provisions in contracts between utilities and municipal corporations. The dispute here has no federal cognizance, and the appeal should be dismissed.

Respectfully submitted,

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FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 740

THE STATE OF OHIO, ex rel. THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Relator-Appellant,

vs.

CITY OF EUCLID, OHIO

and

M. A. SPINO,

Administrative Director of the City of Euclid

and

KENNETH J. SIMS,

Mayor of the City of Euclid

Respondents-Appellees.

BRIEF OF RELATOR-APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

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In the Supreme Court of the United States

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THE STATE OF OHIO, *ex rel.* THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

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CITY OF EUCLID, OHIO,
and
M. A. SPINO,
Administrative Director of the City of Euclid,
and
KENNETH J. SIMS,
Mayor of the City of Euclid,

Respondents-Appellees.

BRIEF OF RELATOR-APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

We respectfully submit that the Brief of Respondents-Appellees filed in support of their Motion to Dismiss the Appeal herein does not support their contention either that the appeal fails to present a substantial Federal question or that the judgment below rests upon adequate non-Federal grounds.

I. THE APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The Brief of Respondents-Appellees argues the Motion to Dismiss as though the sole question litigated here is whether Euclid Ordinance No. 288-1956, which prohibits the issuance of street crossing permits for overhead electric lines carrying energy in excess of 33,000 volts, is con-

stitutional on its face. Nothing could be further from the real issues of this case. Relator-Appellant's case in the Ohio courts was founded on the claim that the *application* of Ordinance No. 288-1956 to deny Relator-Appellant a permit for a *particular* overhead electric line is arbitrary and unreasonable and an improper exercise of the police power because the proposed line is wholly safe and creates no danger to any part of the public. The validity of Ordinance No. 288-1956 as an abstract proposition has not been an issue.

The principal grounds of error urged by Relator-Appellant in this Court go to the manner in which the Ohio Supreme Court decided the case before it. Relator-Appellant shows in its Jurisdictional Statement that it was (a) deprived of its property without due process of law by reason of being required to place the particular high-voltage line underground at great cost, in the face of *express findings* by the trier of fact that the line in question was not a danger to the public and that the Ordinance which would deny appellant a permit for the line was wholly unrelated to the public health, public safety and public welfare, and that the denial of a permit in this case was arbitrary, unreasonable and without any rational relation to the ends for which the police power may be used, and (b) denied procedural due process because the Ohio Supreme Court took judicial notice that the electric line in question was dangerous, contrary to express findings of fact below. Moreover, the Ohio Supreme Court ruled only that Ordinance No. 288-1956 is a valid regulation. It did not decide whether the application of Ordinance No. 288-1956 to the particular facts in the Record was valid.

The Ohio Supreme Court avoided deciding whether the application of the Ordinance was valid by ruling that, as a matter of common judicial knowledge, all high-voltage

wires are dangerous. Six weeks of trial devoted almost exclusively to the presentation of evidence on the question of whether Relator-Appellant's proposed overhead electric lines would *in fact* be dangerous was thus dismissed summarily and without mention by the state court.

Whether a state appellate court can avoid ruling upon the question of the validity of the application of an Ordinance to the facts shown by the Record, by ruling that the Ordinance is valid on its face, and failing to examine or disregarding the evidence in the Record, is a substantial Federal question.

Whether a state appellate court can overrule the express findings of fact of the trier of facts on the ultimate factual question of the case, on the basis of judicial notice, presents a substantial Federal question.

We do not understand Respondents-Appellees to dispute that these are substantial Federal questions. Their Brief proceeds rather to assert a number of propositions of state law, all of which were decided adversely to their contentions by the Court of Appeals and none of which were decided or even mentioned by the Ohio Supreme Court. These propositions have no relevance to the determination of whether the Jurisdictional Statement shows substantial Federal questions or whether the decision below rests on adequate non-Federal grounds.

(a) This Court Has Power to Examine the Opinion of the Ohio Supreme Court for the Purpose of Discovering Whether Error Has Been Committed.

Respondents-Appellees assert that the Federal questions are insulated from plenary review by this Court because the syllabus of the Ohio court's decision makes no mention of judicial notice. While it is certainly true that the syllabus of an Ohio Supreme Court decision states the

law of the case, and such rule has been in effect since 1858 (not 1958 as stated in Appellees' Brief. See 5 O. S. v; Reporter's Note, 94 O. S. ix) nevertheless, it is equally true that the facts and the opinion must be examined to secure a proper understanding and explanation of the succinct statements of law contained in the syllabus.

This Court so held in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952) where the relationship of syllabus and opinion was much as it is at bar. The issue there was whether a foreign corporation could be brought within the jurisdiction of an Ohio court by service upon an officer of the company within Ohio. The Supreme Court of Ohio held service to be insufficient. Its syllabus did not disclose whether the decision was founded upon state law or upon an interpretation of the Federal Constitution. This Court examined the *opinion* (which Appellees here say it may not do) and found a Federal question had been considered by the Ohio Supreme Court. The case was remanded to the state court so that it might decide whether state law closed the courts of Ohio to the litigants under the circumstances.

This Court declined to accept the premise that the Ohio Supreme Court can insulate potential error in the determination of Federal questions by omitting to mention the Federal Constitutional matter in the syllabus:

> "As we understand the Ohio practice, the syllabus of its Supreme Court constitutes the official opinion of that court *but it must be read in the light of the facts and issues of the case.*" (342 U. S. 437 at 441-442) (Emphasis supplied.)

and:

> "A syllabus must be read in the light of the facts in the case, even where brought out in the accompanying opinion rather than in the syllabus itself. See Wil-

liamson Heater Co. v. Radich, supra; Perkins v. Bright, 109 Ohio St. 14, 19-20, 141 N. E. 689, 690-691; *In re Poage*, 87 Ohio St. 72, 82-83, 100 N. E. 125, 127-128." (Note 3, 342 U. S. 437 at 442)

These quotations correctly state the law of Ohio. The syllabus does not stand alone. The opinion and the facts must be examined as well.

> "The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, but such pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court." (Syllabus 1, *Williamson Heater Co. v. Radich*, 128 O. S. 124, 190 N. E. 403 (1934).)

Accord: *In re Poage*, 87 O. S. 72, 100 N. E. 125 (1912); *Perkins v. Bright*, 109 O. S. 14, 141 N. E. 277 (1923); *Charles A. Burton, Inc. v. Durkee*, 162 O. S. 433, 123 N. E. 2d 432 (1954).

The syllabus rule is, of course, intended to aid in the application of the doctrine of *stare decisis*. It is not a rule which precludes a reviewing court from examining the opinion to determine whether error occurred.

It is unnecessary to burden this Brief with references to Ohio practice. This Court has often stated that it will not permit state practice to stay the power of the United States Supreme Court to correct errors committed by a state court in the decision of Federal questions. *Urie v. Thompson*, 337 U. S. 163 at 172 (1949); *Reece v. Georgia*, 350 U. S. 85 at 87 (1955).

Whatever the rule might be with respect to the power of this Court to inquire into the issues and facts underlying a syllabus of the Ohio Supreme Court, it is clear that where, as here, an asserted Federal right rests upon a question of fact, this Court has power to review the record

> "This Court will review the findings of fact by a state court (1) *where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it*, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. [citing cases.] We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits." (*United Gas Public Service Co. v. Texas*, 303 U. S. 123 at 143.) (Emphasis supplied.)

See *Konigsberg v. State Bar of California*, 353 U. S. 252 at 262 (1957); *Napue v. Illinois*, 360 U. S. 264 at 271 (1959).

An examination of the decision in this case makes it clear that substantial Federal questions are presented. The syllabus of the case states, first, that a municipal corporation can establish reasonable regulations for installing electric power lines and, secondly, a municipal ordinance requiring that all electric power lines of a certain size be placed underground is not an unreasonable regulation and is "* * * not unrelated to the health, safety and welfare of the inhabitants of the municipality."

In view of the express finding of fact below, that the particular line to which the Ordinance in question was being applied in this case would have no appreciable effect on the public health, safety or welfare, the decision in this case (as distinguished from the commonplace propositions of law contained in the syllabus) could be explained on only one of two grounds. The court either found that the findings of fact of the trial court were not sustained by substantial evidence (or in some other manner determined

that the facts were such as to bring the Ordinance within the terms of the syllabus) or the court concluded that it makes no difference what the specific facts are. We look to the opinion for an explanation.

We find from the opinion that the court held it did not make any difference what the specific facts were because it took judicial notice that the true facts were contrary to the express findings of fact.

Either ground presents a substantial Federal question of due process of law, as is shown by the cases cited in the Jurisdictional Statement.

(b) The Availability of the Remedy of Mandamus, While a Non-Federal Question, Is Not a Part of this Case.

Appellees' contention of no substantial Federal question appears to rest in large part upon its claim that the ultimate question to be determined is whether a writ of mandamus shall issue by one of the courts of appeals of Ohio. They contend that the question of whether such court has jurisdiction to issue a writ of mandamus is a state and not a Federal question. But no question is presented to this Court relative to the power of an intermediate appellate court in Ohio to issue a writ of mandamus in the case at bar. Nor is the question of propriety of mandamus a question here.

The Court of Appeals ruled that mandamus was the proper remedy and that it had power to issue the writ (Appendix to Jurisdictional Statement A 112-133; A 134). Although virtually the sole argument of Appellees in the Ohio Supreme Court was that Relator had mistaken its remedy, that question was not adverted to or decided by the Supreme Court of Ohio. Rather, that court assumed the propriety of the remedy and decided the case on police

power grounds. The decision does not rest in any part upon the procedural grounds here suggested.

In point of fact, the Ohio Supreme Court decided the procedural point urged by Respondents-Appellees adversely to their contention just two weeks before it issued its original decision in this case. *State ex rel. The Killeen Realty Company v. City of East Cleveland*, 169 O. S. 375, 160 N. E. 2d 1 (1959).

Appellant is not trying here to attack the validity of the Ordinance through which it claims as is suggested by Appellees' Brief. The application of the Illuminating Company for a permit was filed pursuant to the terms of Ordinance No. 32 and not pursuant to Ordinance No. 288-1956. This was settled in the Court of Appeals and was not any part of the decision of the Ohio Supreme Court. The Court of Appeals found that Ordinance No. 32 granted Relator "a franchise contract in perpetuity" (Appendix to Jurisdictional Statement, A-35).

(c) The Right of the Relator-Appellant to Occupy the Streets of the City of Euclid Rests on Federal Constitutional Grounds.

Appellees make the bald assertion that whether or not Relator-Appellant can occupy any of the streets of the City of Euclid is a non-Federal question. This claim was made in both state courts. The Court of Appeals ruled that Ordinance No. 32 granted Relator-Appellant a perpetual franchise contract and amounted to municipal consent to the occupation of the streets by Relator-Appellant's poles. The only limitation on this consent is that the City may enact reasonable police regulations governing the occupancy of the streets by Relator-Appellant. (Appendix to Jurisdictional Statement, A-35.) The Ohio Supreme Court assumed that such was correct interpretation of

the effect of Ordinance No. 32 and addressed its entire attention to whether Ordinance No. 288-1956 was, on its face, a lawful regulation.

The issue at bar is whether the particular regulation, in its application to the facts shown by the Record, is so arbitrary and unreasonable as to amount to a deprivation of Relator-Appellant's property without due process of law. This is a Federal question and it is the primary question litigated. Appellees can not now inject the issue of consent into the case.

II. THE DECISION BELOW DID NOT REST UPON ANY NON-FEDERAL GROUND, ADEQUATE OR OTHERWISE.

The sole question decided by the Ohio Supreme Court was whether Ordinance No. 288-1956, as amended, is a reasonable police power regulation. It considered no state law questions.

Respondents-Appellees' contention that the decision below rests upon an adequate non-Federal ground appears to be based upon a claim that certain conditions of Appellant's franchise contract precedent to the granting of a permit for the erection of lines in the streets, were not complied with, and that the question of the interpretation of such condition precedent is a matter of state law. Without getting into the question of whether, in a given case, the interpretation of a specific provision of a franchise contract is a question of Federal law (which it most certainly is in some cases, *Ohio Public Service Co. v. State ex rel. Fritz*, 274 U. S. 12; *Northern Ohio Traction & Light Co. v. State ex rel. Pontius*, 245 U. S. 574) the questions raised by Respondents-Appellees relate to compliance with conditions precedent in the franchise ordinance, such as whether the insulation was appropriate or whether proper plans were filed. The trial court expressly found in favor of

Relator-Appellant on each and every one of these issues. Undoubtedly, whether these be questions of Federal or state law, the Ohio Supreme Court *could have* overruled the Court of Appeals on these matters. It did not. The Supreme Court of Ohio neither examined nor mentioned nor rested their decision in any way upon such easily remedied grounds.

Respondents-Appellees also assert that the decision rests upon adequate non-Federal grounds by reason of the fact that several state courts have upheld ordinances requiring high-voltage electric lines to be placed underground. In only one of the cited cases was the question of the validity of the *application* of such an ordinance to a particular state of facts presented. In that case, *Bell Telephone Company of Pennsylvania*, 138 Pa. Super. 527, 10 A. 2d 817 (1940), the court did exactly as Relator-Appellant insists the Ohio Supreme Court should have done. It examined the Record and found, *from the weight of the evidence*, that there was a substantial danger presented by the lines in question and the application of the ordinance to require the line to be placed underground was upheld.

> "*A careful reading of all the evidence convinces us that it is sufficient to support the findings.* There was evidence that wires had interfered in the efficient control of a fire that had damaged two buildings in this borough, and in addition there was opinion evidence of individuals, with experience as firemen, that the wires would in the future necessarily interfere in combatting fires or in removing persons from burning buildings." (10 A. 2d 817, 819) (Emphasis supplied.)

Where the attention of an appellate court has been addressed to the question of whether a statute or ordinance prohibitive of overhead electric wires is related to

the proper uses for which the police power may be exercised, the courts have unanimously (with the exception of the Ohio Supreme Court in the principal case) addressed themselves to whether the evidence supports the reasonableness of the regulation in its application to the facts before it. See *Long Island Lighting Co. v. Village of Old Brookville*, 84 N. Y. S. 2d 385 (Sup. Ct. Special Term, Queens County); *Postal Telegraph-Cable Co. v. Ingraham*, 228 F. 392 (D. Me. 1915); *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 114 N. W. 588 (1908); *Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69 (1900); *Rockland Electric Co. v. Borough of Montvale*, 104 N. J. L. 480, 141 A. 673 (1928). A like rule is applied by Public Utilities Commissions. See *In re Boston Edison Co.*, 79 PUR N. S. 1 (Mass. D. P. U. 1949); *Property Owners of Westchester County v. Westchester Lighting Co.*, 1932C PUR 503 (1932).

The fact that these states have decided the due process and police power questions adversely to the contentions of Respondents-Appellees and to the decision of the Ohio Supreme Court herein goes far towards establishing the substantiality of the Federal questions.

CONCLUSION.

It is apparent from the Jurisdictional Statement and even from the Brief of Respondents-Appellees in support of the Motion to Dismiss, that substantial Federal questions exist and that the decision of the court below did not rest on any non-Federal basis The Supreme Court of Ohio decided (1) that the Ordinance is valid on its face although the question litigated was whether the application of the ordinance to a specific electric line was a denial of Federal due process and (2) that, in spite of express

findings of fact to the contrary based upon substantial evidence in the court below, as a matter of judicial notice all electric lines are dangerous to the public.

It is respectfully submitted that the Jurisdictional Statement shows substantial Federal questions. The Motion to Dismiss should be overruled and probable jurisdiction should be noted.

Respectfully submitted,

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